Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

In re LAWRENCE B. SMITH,

Petitioner.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, THE HONORABLE JOHN O. NEWMAN, CHIEF CIRCUIT JUDGE, THE HONORABLE RALPH K. WINTER, CIRCUIT JUDGE, THE HONORABLE DENNIS G. JACOBS, CIRCUIT JUDGE; THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, AND THE HONORABLE THOMAS J. MCAVOY, CHIEF DISTRICT JUDGE

PETITION FOR AN EXTRAORDINARY WRIT (MANDAMUS)

LAWRENCE B. SMITH
3938 E. GRANT RD., #191
TUCSON, ARIZONA 85712
602/326-0283

PETITIONER PRO SE

OCTOBER, 1994

40 pp

QUESTIONS PRESENTED

1. Having remanded a Rule 11 sanction award to the district court for reconsideration pursuant to the Supreme Court's mandate that the new Rule 11 be applied to pending cases, may a United States court of appeals, and United States district court, restrict that consideration to whether use of the term "may," rather than "shall," would change the district court's original ruling, as opposed to giving the lawyer sanctioned the full benefit of the new rule, especially when all that counsel had done was file a complaint and the original district court award failed to address each individual count therein, much less, explain why no reasonable argument could be made in its behalf?

2. Is not sanctioned counsel also entitled to have the district court weigh the equities involved in his financial condition against the fact that only a complaint was filed?

[Second Circuit Docket No. 93-6093]

v.

SAMUEL K. SKINNER, Secretary, Department of Transportation; JAMES B. BUSEY, IV, Administrator, FAA; C. DEAN MCGRATH, JR., Acting General Counsel, Department of Transportation; NEIL R. EISNER, Assistant General Counsel, Department of Transportation; KENNETH P. QUINN, Chief Counsel, FAA; GREGORY S. WALDEN, Former Chief Counsel, FAA; DANIEL D. CAMPBELL, General Counsel, National Transportation Safety Board; JOHN M. STUHLDREHER, Former General Counsel, National Transportation Safety Board; JOHN H. CASSADY, Deputy Chief Counsel, FAA; DONALD P. BYRNE, Assistant Chief Counsel, FAA; PETER J. LYNCH, Lawyer, FAA; MARDI R. THOMPSON, Lawyer, FAA; KAREN R. BURY, Lawyer, FAA; JOSEPH A. CONTE, lawyer, FAA; HARRY S. GOLD, Lawyer, FAA; LORRETTA E. ALKALAY, Assistant Chief Counsel, FAA; RANDY E. HYMAN, Lawyer, FAA; BRUNHILDA SANDERS-LANE, Lawyer, FAA; DANIEL J. PETERSON, Regional Director, FAA; THOMAS ACCARDI, Official, FAA; NICHOLAS A. SABATINI, Official, FAA; CHARLES G. O'NEILL, official, FAA; ROY E. JOHNSEN, Former Official, FAA; MARINUS "RENE" KOCH, Inspector, FAA; STEPHEN W. SMITH, Inspector, FAA; MARTIN J. INGRAM, Inspector, FAA; ROBERT E. MARTIN, Official, FAA; GEORGE MURGITROYDE, Official, FAA; MARC PANDELOGLOU, Official, FAA; ROBERT D. MURCHLAND, Inspector, FAA; EDWARD HARAHUSH, Inspector, FAA.

[Second Circuit Docket 93-6297]

v.

UNITED STATES OF AMERICA

[Cases consolidated on appeal.]

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602/326-0283

PETITIONER PRO SE

OCTOBER, 1994

Petitioner Lawrence B. Smith prays that a writ of mandamus issue to the United States Court of Appeals for the Second Circuit, and the Honorable John O. Newman, Chief Circuit Judge, the Honorable Ralph K. Winter, Circuit Judge, the Honorable Dennis G. Jacobs, Circuit Judge, and the United States District Court for the Northern District of New York, and the Honorable Thomas J. McAvoy, Chief District Judge, on the grounds and for the reasons hereinafter set forth.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Second Circuit which is the principal subject of this petition is reproduced at page a-1 (appendix), and reported at 999 F.2d 708 (2nd Cir. 1993). It consolidates the appeals of two Fed.R.Civ.P.11 sanction actions against petitioner. The relevant district court orders are reproduced in the appendix at a-

26, a-37, a-40, a-41, a-51 and a-53. The district court orders rendered after remand by the Second Cicruit are at a-186 and a-188. The first of the sanction cases is reported as *Knipe v. Skinner*, 146 F.R.D. 58 (N.D.N.Y. 1993); the second, *Knipe v. United States*, 151 F.R.D. 24 (N.D.N.Y. 1993).

JURISDICTION

Jurisdiction of the United States District Court, Northern District of New York in *Knipe v. Skinner*, a so-called *Bivens* constitutional rights violation case,[1] was pursuant to 28 U.S.C. § 1331; jurisdiction of *Knipe v. United States*, was pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq. & 1346(b).

Jurisdiction of the United States Court of Appeals for the Second Circuit of both cases was pursuant to 28 U.S.C. § 1291 and

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[1] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

Fed.R.App.P.3.

Jurisdiction of a petition for an extraordinary writ (mandamus) in the Supreme Court is pursuant to 28 U.S.C. § 1651(a). Should the Court treat this as a petition for a writ of certiorari, jurisdiction may be invoked pursuant to 28 U.S.C. § 1254(1). An order, No. A-68, extending time to file such a petition to October 16, 1994, is dated July 29, 1994.

STATUTES INVOLVED

No statutes, other than 28 U.S.C. § 1651, are relevant to the issues raised herein. Relevant, however, are this Court's Order of April 22, 1993, regarding implementation of amendments to the Federal Rules of Civil Procedure, the new Fed.R.Civ.P.11 (1993); and the old Fed.R.Civ.P.11 (1983).

STATEMENT OF THE CASE

Petitioner, as counsel for Richard X. Knipe, Glenn A. Valentine and Bernard C.

Ford, initiated on their behalf as joint plaintiffs both a *Bivens* action and an FTCA action. In hindsight, it would have been preferable to have initiated separate complaints for each person, but all the allegations arose basically from the same set of circumstances. These are set out in detail in the complaints which are reproduced in the appendix: *Bivens* at a-54, FTCA at a-114. A shorter statement is contained in the FTCA case presently before the Court in *Knipe v. United States*, No. 94-424. The issue there is subject matter jurisdiction. The case involves a direct conflict between circuits. And, as noted in the Supplemental Brief recently filed, the conflict has been further sharpened because of the decision in *Mace v. Skinner*, No. 92-17014, slip op. at 10487 (9th Cir. Sept. 6, 1994) (WESTLAW 1994 WL476730). The Ninth Circuit in a carefully reasoned and lengthy opinion of national significance has held

that United States district courts do in fact have subject matter jurisdiction of challenges to Federal Aviation Administration (FAA) enforcement practices even though by virtue of 49 U.S.C. app. § 1486 courts of appeals have jurisdiction over FAA enforcement orders. Although a *Bivens* action, the decision's rationale applies equally to FTCA cases. *Mace* is one of petitioner's cases, and of the same series of which the instant *Knipe* cases are part, with many identical issues.[2]

At this point, however, the basic problem at the center of this petition for mandamus is that neither Justice Department counsel, who represent the individual *Bivens* defendants and, of course, the

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[2] Recently during oral argument before the Tenth Circuit, one judge posed the question of how it would make sense to sanction a lawyer for a frivolous complaint when another circuit (*Mace*) was returning a similar complaint to district court where it would receive thorough consideration.

United States, nor district and appeals court, ever deal with the specific counts in the complaint, whether case-in-chief, or motion for sanctions. Even though the counts in the complaints are carefully prepared and segregated from one another, so that should one fall it does pull down another, both defense counsel and courts have painted all allegations with the same brush. Nor, while awarding sanctions, which total $16,252.89 ($9,000.00 plus $7,252.89, plus interest), did the district court give the slightest consideration into the equity of such huge fines in regard to counsel's resources.

Petitioner has a net worth of about minus $24,000, a result of the public interest work he has been pursuing now for fifteen years. At age 65, if such debts stand it will mean bankruptcy. Which would be truly ironic, since neither Justice Department counsel nor any court has ever

pointed to any language in the United States Code, Code of Federal Regulation, Federal Register, or legislative history that even hints at a connection between airsafety violations and suspension or revocation of a pilot's license as a penalty — or for any other reason.

Petitioner of course appealed both sanction awards. They were consolidated by the appeals court. During oral argument Justice Department counsel suggested to the court that in accordance with the Supreme Court Order of April 22, 1993, it remand the sanction cases to the district court. Justice Department counsel, however, urged the court to limit consideration during remand to whether the district court might change its mind since the new rule stated that the district court "may" award sanctions, whereas, the old rule, with the term "shall," made a sanction mandatory if warrranted.

The problem is that such referral, given the huge size of the sanctions, was meaningless. Had a sanction been a token hundred dollars or so, a court might remove it. Most importantly, there was no lawful basis to restrict application of the new Rule 11. By doing so the Second Circuit denied petitioner the two most critical provisions of the new Rule: (1) need for careful legal analysis of each count; (2) consideration of the equity of any award in regard to counsel's resources, and whether all, or only one or two counts deserved sanction.

(It should be noted that neither of these concepts are new ideas, but based on established precedent — not to mention obvious concepts of due process.)

I. JUSTIFICATION FOR MANDAMUS

A. In aid of appellate jurisdiction —

Petitioner would be the first to concede that a petition for a writ of certiorari

could be filed pursuant to 28 U.S.C. § 1254(1). But this would only have made sense if the Second Circuit had refused to remand pursuant to the April 22, 1993 order. And even then a writ of mandamus would have made more sense. Were this Court to entertain a writ of certiorari it would have nothing more in the record than what is present. And petitioner would be effectively denied any opportunity to show that none of the carefully constructed counts in the complaints was in the least bit frivolous since there would be no lawyer-like argument upon which a court could make an intelligent decision.

Mandamus is clearly in aid of the Court's appellate jurisdiction, and if it instructs both the court of appeals and district court to give petitioner full benefit of the mandates of the new Rule 11, then a full record will be had to support careful appellate review of the critical

issue: that issue is only whether a reasonable argument can be made in behalf of the particular count or cause of action. Petitioner otherwise is left in a Kafkaesque position of not being able to defend against exactly what defendants (Justice Department counsel) say is frivolous about any given count.

Using this method, it is highly likely that no appeal from district court will ever be necessary and justice will be done.

B. Exceptional circumstances — Without relief here this attorney will be stuck with more than $16,000 in fines. But because of the use of the same techniques — deliberately failing to deal with individual counts, counsel faces similar fines which total over $40,000. How is any lawyer ever going to attack governmental misconduct (and if failing to have a statute, rule, statement in the Federal Register or legislative history for a

program that deprives persons of their right to make a living, we don't know the meaning of the word) when faced with such drastic fines and no way to defend himself? One million pilots and mechanics are active in aviation, according to FAA public information personnell in Oklahoma City. Who is going to try to protect their interests if one is disciplined for simply filing a complaint? The new Rule 11 has clearly been misused in this case. Granting a writ of mandamus here that simply instructs the lower courts to follow that rule, especially in regard to its two most important facets, dealing with each count, equity for the lawyer, will be of enormous precedential value to other courts, attorneys, and litigants.

C. No other adequate relief — The question may arise as to why petition does not seek a writ of mandamus from the Second Circuit. The reason: We did — in a twenty-

page Petition for Rehearing, to no avail. This was after the district court promptly filed its speedy response. See appendix a-186 and a-188.

D. Tainted decision — "Tainted" may be a rather strong term to describe an appeals court decision, and we apologize for using it, except the term fits. The Second Circuit in regard to the FTCA case said:

> In *Knipe v. United States*, 151 F.R.D. 24 (N.D.N.Y.) 1993), the district court imposed sanctions against Smith, concluding that in filing the complaint four days after dismissal of *Knipe v. Skinner*, Smith had "violated Rule 11 by interposing a pleading that has no good faith basis in the law for an improper purpose." *Id.* at 26. We hold that the district court's ruling that Smith violated Rule 11 was not an abuse of discretion.
>
> . . . .
>
> [R]easserting those arguments in a new complaint in a district court four days after that court has rejected those arguments in the context of the same factual circumstances affords grounds for finding that the new pleading was interposed for an improper purpose.

Appendix at a-19, a-21. All of this underscores the belief of the district court, affirmed by the Second Circuit, that

these lawsuits were a plot by plaintiffs' counsel. The fact both courts believe the FTCA timing reveals some sinister motive is the most unfounded accusation we ever hope to face as a lawyer. It colors the entire decision. What disturbs us is the ease with which Justice Department counsel were able to sell the idea it is somehow sinister to file one action later than the other. They know Congress has specifically recognized *Bivens* and FTCA compatibility. 28 U.S.C. § 2679(b)(1), makes a negligence action against the government the exclusive remedy. It bars action against the individual employee or his estate "whose act or omission gave rise to the claim." *Id.* In 1988, however, Congress amended this to exempt from that bar "a civil action against an employee of the Government--(A) which is brought for a violation of the Constitution of the United States . . ." 28 U.S.C.A. § 2679(b)(2)(A) (pocket part).

Thus by law, the actions are expressly compatible.

Since the district court specifically ruled no harassment was involved in the *Bivens* case, a-35, both courts are saying counsel should be punished because of *an accident of timing*. There are practical reasons for that. Once it is decided to take action on both theories of liability, the lawyer is faced with statute of limitations problems. The appeals court asks why the two complaints were not combined. ("Smith offered no reason why his theory of liability under the FTCA could not have been included in his first complaint . . ."). a-22. The actions require two different complaints because one is strictly a civil rights action against individual officials under the federal question statute, 28 U.S.C. § 1331; the other for governmental negligence, pursuant to 28 U.S.C. §§ 2671 et seq and 1346(b).

Generally a *Bivens* action has to be filed within the state statute of limitations for personal injury, usually two years. In the instant *Bivens* action that statute was about to run.

The problem of simultaneity is created because before one files an FTCA action he must first file a claim with the "appropriate Federal agency," 28 U.S.C. § 2675(a), and then cannot file a lawsuit until at least six months have passed, or the agency denies it, whichever comes first. *Id*. Even were there no statute of limitations problem, instead of twiddling one's thumbs, it makes sense to get the *Bivens* action underway while awaiting the six-months or so for the FTCA claim denial; then move to consolidate them for trial.

E. The new Rule 11 — In pertinent part, Rule 11 now provides:

> **(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion,

or other paper, an attorney or unrepreseented party is certifying that to the best of his knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, of specifically so identified, are like to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonable based on a lack of information or belief.

(c) Sanctions. If after notice and a reasonable opportunity to respond, the court determines that that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By motion. A motion for sanctions under this rule shall be made separately from other motions or requests and *shall describe the specific conduct alleged to violate*

subdivision (b). It shall be served as provided in Rule 5, but shall not be field with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn, or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order *describing the specific conduct that appears to violate subdivision (b)* and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule *shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.* Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directive of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys fees and other expenses incurred as a direct result of the violation.

. . . .

> **(3) Order.** When imposing sanctions, *the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.*

Fed.R.Civ.P.11 (1993) (emphasis added). By order implementing the new Rule 11 and amendments to others, this court, *inter alia*, provided:

> 2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 1993, and shall govern all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending.

Supreme Court Order of April 22, 1993.

F. Appeals court view of the rule — The Second Circuit:

> [W]e conclude that a just and practicable application of the amended Rule 11 requires that the district court be afforded an opportunity to exercise its discretion whether to impose sanctions under the amended version.
>
> However, on remand the district court should otherwise adhere to the version of Rule 11 in effect at the time of its prior decisions. ***Any further retroactive application of the amended Rule 11 would charge Smith with knowledge of a rule not in effect at the time of filing and therefore would not advance Rule 11's central goal of deterring baseless filings.***

a-24-25 (emphasis added). The italicized statement, in our view, is unintelligible.[3] Only two things matter in this case: (1) the need to direct argument to specific counts; (2) the question of equity. Neither is a new idea.

In providing an interpretation of the new Rule, Fed.R.Civ.P.11(c)(2), the Advisory Committee (whose notes are virtually part of it) instructed that one consideration was "what amount, given the financial resources of the responsible person, is needed to deter that person from

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[3] ". . . [W]here the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put in force," mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule involved. . . . ". . . to find that the rules have been practically nullified by a district judge . . . it would not hesitate to restrain [him]. . . ." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957).

repetition in the same case . . . subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct . . ." 2A Moore's Federal Practice ¶ 11.01[9], p. 72 (Cum.Supp. 1993-1994). (Bankruptcy would certainly be an efficient deterrent.) The ability to pay is not a new idea. "One equitable consideration . . . is the sanctioned attorney's (or party's) assets." *Brown v. Federation of State Medical Boards of U.S.*, 830 F.2d 1429, 1439 (7th Cir. 1987). "As we have stated, 'fee awards are an equitable matter, thereby permitting the district court to consider the relative wealth of the parties. [Citing case.]" *Id.* at 1440. How would it not be "just and practicable" for the District Court to take a look at our financial condition?

G. Penalty to be paid into court: -- Explaining the basis for Fed.R.Civ.P.

11(c)2), the Advisory Committee writes:

> Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, *it should ordinarily be paid into court as a penalty*. However, under *unusual circumstances* . . . some or all of this payment may be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorney's fees for the services directly and unavoidably caused by the violation of the certification requirement, *If, for example, a wholly unsupportable count were included in a multi-count complaint* or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expense should be *limited to those directly caused by the inclusion of the improper count, and not those directly resulting from the filing of the complaint or answer*. . . . Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having *modest financial resources*. . . .

2A Moore's Federal Practice ¶ 11.01[9], p. 72-73 (Cum.Supp. 1993-1994) (emphasis added). All this attorney has done is file two complaints. Are we not entitled to know what are the "unusual circumstances" and

needless expenses that require such an enormous fine. The government is hardly impecunious. Why would it not be just and equitable to consider that? Which leads us into the next requirement of the new rule, not to mention due process:

H. Specificity — While the question of financial ability is terribly important, of greater importance is the issue of specificity. It is upon this ground that this Court should remand the case and instruct the Second Circuit to remand to the district court lower court with instructions to deal with each specific count in the complaints.

Specificity is not a new concept this attorney had no right to rely on before the amended Rule 11 took effect. It is a basic concept of due process. Neither in these nor any other cases-in-chief in the series has Justice Department counsel ever taken the issues count by count, allegation by

allegation, and dealt with them. Never have they taken one, quoted its language to indicate they understood what it was complaining of, then brought in a similar case and explained how its factual and legal conclusions were relevant. Not to mention that it is a huge leap from saying a claim is not legally well-founded to saying it is so frivolous that the plaintiff's lawyer should be punished. The fact is that all defense counsel have ever done is cite some cases, make a generalized statement, then, using the paragraph symbol ("¶"), make a list of paragraph numbers, sometimes a half-dozen or more. Their purpose is not to guide the court, but to leave it to flounder around on its own with an issue, and deprive the plaintiff of an opportunity to focus on it.

The burden of proof, so to speak, is on the party who moves for sanctions. Justice Department counsel never offered any legal

support for the harassment claim. The law is clear as to who bears the burden: "To recover fees based upon the provisions of Rule 11, as amended in 1983, a party need show that his opponent's actions were unfounded in light of the law as it might develop and in light of supporting facts which might be established." *Weir v. Lehman Newspapers, Inc.*, 105 F.R.D. 574, 575 (D. Colo. 1985).

The concept of specificity is not new. Without it, one is left in the Kafkaesque position of not really being able to defend himself. "This is the first case in which we have participated where sanctions were imposed when the complaint asserted a mix of frivolous and non frivolous claims." *Dodd Ins. Services v. Royal Ins. Co. of America*, 935 F.2d 1152, 1159 (10th Cir. 1991).

> We hold that a pleading containing both frivolous and nonfrivolous claims may violate Rule 11. . . . The presence of a single frivolous or groundless claim,

however, may not always mandate Rule 11 sanctions. For example, a frivolous claim easily disposed of by the opposing party and the court might not warrant sanctions. *Id.* at 1158. The complaints in the instant case were "easily disposed" of by way of motion to dismiss. Concurring:

> [H]ere we conclude that the district court did not provide adequate specificity in the award of sanctions. In light of the need for this court to again remand for more particular findings, we request that in cases involving substantial awards a district judge state with some specificity the reasons for the imposition of a sanctions, and the manner in which the sanction was computed.

Brown v. Federation of State Medical Boards of U.S., 830 F.2d 1429, 1438 (7th Cir. 1987). It was important "whether discovery would have been beneficial to the development of the underlying facts." *Id.* at 1435. "Due to the impact sanctions may have on a party or an attorney's career and personal well-being, sanctions should not be lightly imposed. [Citing case.]" *Id.* at 1437. Clearly, prompted by such cases, the new rule provides:

(1)(A) A motion for sanctions under this rule shall be made separately from other motions or requests *and shall describe the specific conduct alleged to violate subdivision (b)*.

(1)(B) On its own initiative, the court may enter an order *describing the specific conduct* that appears to violate subdivision (b) . . .

. . . .

(3) When imposing sanction, the court *shall describe the conduct determined to constitute a violation* of this rule and *explain the basis* for the sanction imposed.

Fed.R.Civ.P.11(c)(1)(A), (1)(B), and (3) (emphasis added). It was important to the Committee "Whether the improper conduct . . . infected the entire pleading, *or only one particular count* or defense . . ." 2A Moore's Federal Practice ¶ 11.01[9], p. 72 (Cum.Supp. 1993-1994) (emphasis added). "To stress the seriousness of a motion for sanctions and *to define precisely the conduct* claimed to violate the rule, the revision provides that the 'safe harbor' period begins to run only upon service of the motion." *Id.* at 11.01[9], p. 74 (emphasis added).

As indicated, Appellant has been

afforded no specificity by defense counsel, trial court, or appeals court. The problem is that Justice Department counsel have been able to sell the idea the there is one basic issue: whether the FAA has statutory authority to suspend or revoke a license as a penalty for a safety violation. In its opinion the Second Circuit makes the following comments, which we provide as samples:

> [N]o good faith argument was advanced in support of the claims asserted in plaintiff's complaint. (a-13) **[Which claims?]**

> [P]laintiffs' complaint repeatedly alleged that FAA officials lack authority to commence certificate actions against alleged FAR violators, rather than impose civil money penalties. (a-14) **[In regard to which counts?]**

> In light of *Go Leasing's* affirmance of the validity of the FAA enforcement procedures challenges by plaintiffs, Smith cannot credibly argue that appellees could reasonable have known in 1988 that their conduct violated clearly established constitutional rights. (a-14) **[In regard to what conduct spelled out in what count?]**

Smith offers no authority demonstrating

> that appellee's alleged conduct would violate any clearly established constitutional right. (a-17-18) **[In regard to what conduct?]**

For the sake of a few examples to support the need for specificity, we confine ourselves to the FTCA complaint, *Knipe v. USA,* No. 93-6297. It needs to be understood that there are really three individual lawsuits in each complaint. Had we been prescient and foreseen this Rule 11 turmoil, we would have filed three separate actions. We can only summarize here.

Mr. Knipe: Two inspectors performed a base inspection of Mall Airways, but although requested to state what they found wrong, declined to say. a-120. This refusal violated a specific section of the Federal Aviation Act and must be taken as true. a-140. Where is an argument by defense counsel that federal officials can violate their agency's charter and it not either be a violation of due process or negligence? Two weeks later one inspector came back as

leader of a special inspection team and presented Mall Airways with a complaint about emergency crew training, a matter which he knew about months earlier. Yet it was so much a threat to safety he threatened emergency action to shut down the operation. a-125, a-129, a-130. Rather than argue, Mr. Knipe brought all his pilots back and gave them the hands-on training the inspector was complaining about, although the company had been using a videotape with FAA permission for six years.

Even though Mall corrected the only thing complained of that was asserted to create an emergency situation, FAA lawyers, under threat of an emergency order of revocation of Mall's operating certificate, kept the company shut down. The charge is that FAA officials violated the agency "rule" on when to use the emergency power. a-143. Where is an argument by defense

counsel that a reasonable argument cannot be made that the violation of an agency's own rules is a violation of due process, or that the officials had discretion to violate their own rules?

Mr. Valentine: FAA officials coerced Mall Airways into firing Mr. Valentine from his management position. a-128. This was without any authority, and violated the specific provisions of the only rule that had some relevance. Where is an argument by defense counsel that no reasonable argument can be made that this violated Mr. Valentine's right to due process? Ditto, for charging him with violating a non-existent rule. a-150. Ditto, for seeking to take his pilot's license as punishment for a bookkeeping non-rule that related to his "license" to be a director of operations but had no relationship to his pilot's license which authorized him to fly commercial aircraft. a-151. Is it really

the position of both district and appeals court that no reasonable argument can be made that FAA officials had no authority to blacklist the three plaintiffs and that such violated their right to due process?

Mr. Ford: The charge is that the license penalty sought against Mr. Ford was a penalty created by the executive branch of government. a-156. As noted several times here and in all our pleadings, this is the central issue concerning punitive suspensions. Where is an argument by defense counsel that no reasonable argument can be made in support of this charge? Justice Department counsel have *never* even acknowledged this charge in some three dozen pleadings and briefs.

CONCLUSION

For the foregoing reasons, petitioner prays:

1. That a writ of mandamus issue from this Court directed to the United States

Court of Appeals for the Second Circuit, the Honorable John O. Newman, Chief Circuit Judge, The Honorable Ralph K. Winter, Circuit Judge, the Honorable Dennis G. Jacobs, Circuit Judge, the United States District Court for the Northern District of New York and the Honorable Thomas J. McAvoy, Chief District Judge, requiring the aforesaid judges to show cause on a day fixed by this Court why mandamus should not issue from this Court directing said Honorable Judges to vacate their judgment of March 3, 1994, and remand *Knipe v. Skinner, Lawrence B. Smith, Appellant,* No. 93-6093, and *Knipe v. United States, Lawrence B. Smith, Appellant*, No. 93-6297, to the United States District Court for the Northern District of New York with the following instructions:

(1) That in the Rule 11 sanction actions involving Lawrence B. Smith, counsel for plaintiffs, the full provisions of

Fed.R.Civ.P.11 (1993) be applied to the sanction issue, with special attention to having arguments and making orders regarding each count in the complaints; and

(2) That in the event sanctions are found to be warranted the district court give careful consideration to the equities involved and the financial assets and abilities of Mr. Smith.

(3) That petitioner may have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

_____

Lawrence B. Smith
Petitioner, Pro Se

Supreme Court, U.S.
FILED

(2)

94 728 OCT 17 1994

OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

In re LAWRENCE B. SMITH

Petitioner.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, THE HONORABLE JOHN O. NEWMAN, CHIEF CIRCUIT JUDGE, THE HONORABLE RALPH K. WINTER, CIRCUIT JUDGE, THE HONORABLE DENNIS G. JACOBS, CIRCUIT JUDGE; THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, AND THE HONORABLE THOMAS J. MCAVOY, CHIEF DISTRICT JUDGE

APPENDIX TO ACCOMPANY
PETITION FOR AN EXTRAORDINARY
WRIT (MANDAMUS)

LAWRENCE B. SMITH
3938 E. GRANT RD., #191
TUCSON, ARIZONA 85712
602/326-0283

PETITIONER PRO SE

OCTOBER, 1994

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[p. 2189]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 854, 1335—August Term, 1993
(Argued: Jan. 14, 1994)
(Decided: Mar. 3, 1994))

Docket Nos. 93-6093, 93-6297

RICHARD X. KNIPE, GLENN A VALENTINE, BERNARD C. FORD,

Plaintiffs,

LAWRENCE B. SMITH, Esq.,

Appellant,

—v.—

SAMUEL K. SKINNER, Secretary, Department of Transportation; JAMES B. BUSEY, IV, Administrator, FAA; C. DEAN MCGRATH, JR., Acting General Counsel, Department of Transportation; NEIL R. EISNER, Assistant General Counsel, Department of Transportation; KENNETH P. QUINN, Chief Counsel, FAA; GREGORY S. WALDEN, Former Chief Counsel, FAA; DANIEL D. CAMPBELL, General Counsel, National Transportation Safety Board; JOHN M. STUHLDREHER, Former General Counsel, National Transportation Safety Board; JOHN H. CASSADY, Deputy Chief Counsel, FAA; DONALD P. BYRNE, Assistant Chief Counsel, FAA; PETER J. LYNCH, Lawyer, FAA; MARDI R. THOMPSON, Lawyer, FAA; KAREN R. BURY, Lawyer, FAA; JOSEPH A. CONTE, lawyer, FAA; HARRY S. GOLD, Lawyer, FAA; LORRETTA E. ALKALAY, Assistant Chief Counsel, FAA; RANDY E. HYMAN, Lawyer, FAA; BRUNHILDA SANDERS-LANE, Lawyer, FAA; DANIEL

J. PETERSON, Regional Director, FAA; THOMAS ACCARDI, Official, FAA; NICHOLAS A. SABATINI, Official, FAA; CHARLES G. O'NEILL, official, FAA; ROY E. JOHNSEN, Former Official, FAA; MARINUS "RENE" KOCH, Inspector, FAA; STEPHEN W. SMITH, Inspector, FAA; MARTIN J. INGRAM, Inspector, FAA; ROBERT E. MARTIN, Official, FAA; GEORGE MURGITROYDE, Official, FAA; MARC PANDELOGLOU, Official, FAA; ROBERT D. MURCHLAND, Inspector, FAA; EDWARD HARAHUSH, Inspector, FAA.

RICHARD X. KNIPE, GLENN A VALENTINE, BERNARD C. FORD,

Plaintiffs,

LAWRENCE B. SMITH, Esq.,

Appellant,

—v.—

UNITED STATES OF AMERICA,

RESPONDENT

Before:

NEWMAN, *Chief Judge*,
WINTER and JACOBS, *Circuit Judges*

[p.2191] Consolidated appeals from two decisions of the United States District Court for the Northern District of New York (Thomas J. McAvoy, *Chief Judge*) sanctioning an attorney pursuant to Fed.R.Civ.P.11.

Although we conclude that the district court properly imposed sanctions under the version of Rule 11 in effect at the time of its decisions, we remand that it may exercise its discretion whether to grant sanctions in light of the 1993 amendments to Rule 11.

LAWRENCE B. SMITH, *Pro se.*

PIERRE R. ST. HILAIRE (Frank w. Hunger, Assistant Attorney General, Gary L. Sharpe, United States Attorney, Helene M. Goldberg, Director, Torts Branch, Civil Division, United States Department of Justice, Washington, D.C., of counsel), *for Defendants-Appellees Samuel K. Skinner, et al.*

WENDY L. ROME, Trial Attorney, United States Department of Justice, Washington, D.C. (Frank W. Hunger, Assistant Attorney General, Gary L. Sharpe, United States Attorney, James Woods, Assistant United

States Attorney, Robert A.K. Doehl, Trial Attorney, Torts Branch, Civil Division, United States Department of Justice, Washington, D.C., of counsel), *for Defendant-Appellee United States of America*.

[p. 2192] WINTER, *Circuit Judge:*

In these consolidated appeals, Lawrence B. Smith, counsel for plaintiffs Richard X. Knipe, Glenn A. Valentine and Bernard C. Ford, appeals from two decisions by Chief Judge McAvoy sanctioning Smith pursuant to Fed.R.Civ.P.11. In *Knipe v. Skinner*, 146 F.R.D. 58 (N.D.N.Y. 1993), the district court concluding that Smith had violated Rule 11 by filing a complaint that was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. In *Knipe v. United States*, 151 F.R.D. 24 (N.D.N.Y.) 1993), the district court again sanctioned Smith under Rule 11 after concluding that

he had filed a complaint lacking a good faith basis in law for an improper purpose.

We hold that the district court properly imposed sanctions pursuant to Rule 11 as it existed at the time of the decisions from which Smith appeals. However, we remand so that the district court may exercise its discretion whether to impose sanctions as provided in the 1993 amendments to Rule 11.

BACKGROUND

The events underlying this appeal are described generally in *Knipe v. Skinner*, 999 F.2d 7078, 709 (2d Cir. 1993). We briefly summarize those events and add additional background relevant to this appeal.

Knipe was the owner and operator of Mall Airways, Inc. ("Mall"), a commuter airline based in Albany, New York. Valentine and Ford were managers of Mall. In 1988, the Federal Aviation Administration ("FAA") conducted an investigation of Mall and

determined that the airline was violating Federal Aviation Regulations ("FAR") per-
[p. 2193] taining to emergency safety requirements. The FAA threatened a certificate action against the airline and then closed Mall for two months until it complied with the FARs. In addition, it unsuccessfully attempted to revoke Valentine's and Ford's FAA-issued Airline Transport Pilot certificates and charge Knipe with civil penalties for the FAR violations. *See* 49 U.S.C. app. §§ 1429(a), 1471(a)(1).

After the inspection, Mall entered into a consent order under which it agreed not to resume operations without prior permission from the FAA. It also agreed to remove Valentine and Ford from their management positions. Mall then terminated the employment of Valentine and Ford and resumed its operations. Mall has subsequently been sold to another airline.

The action underlying the first of these consolidated appeals was initiated when plaintiffs Knipe, Valentine and Ford, with Smith as counsel, brought suit against thirty-one present and formed federal officials of the FAA, Department of Transportation ("DOT"), and the National Transportation Safety Board ("NTSB") (collectively "appellees") in their individual capacities, seeking damages from the defendants personally under *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388 (1971). *See Knipe v. Skinner*, 91-CV-1338 (N.D.N.Y. Oct. 23, 1992), *aff'd* 999 F.2d 708 (2d Cir. 1993). Asserting nineteen claims for relief, plaintiffs alleged that appellees violated various constitutional provisions in their enforcement of the Federal Aviation Act of 1958, 72 Stat.731, as amended, 49 U.S.C. app. § 1303 *et seq.* ("the FA Act").

The district court dismissed plaintiffs'

complaint, holding that the appellees had acted within the scope of their statutory and regulatory power, that the Fifth and Sixth [p. 2194] Amendments had not been violated, and that the FA Act was constitutional. In *Knipe v. Skinner*, 999 F.2d at 709-11, we affirmed dismissal of the complaint. Following the dismissal of the complaint, appellees moved in district court for sanctions against Smith, pursuant to Rule 11, The district court granted the motion, concluding that the complaint was not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. The government requested sanctions in the amount of $9,212.39, a figure chosen to reflect attorneys' fees and travel expenses. When Smith failed to respond to the government's submission as to the amount of sanctions, the district court imposed a $9,000 sanction.

After dismissal of the *Bivens* action, plaintiffs, again with Smith as counsel, brought suit against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 ("FTCA"). *Knipe v. United States,* 92-CV-1389 (N.D.N.Y.), Apr. 12, 1993). *aff'd by order,* No. 93-6162 (2d Cir. Dec. 3, 1993). In this complaint, plaintiffs sought money damages under the FTCA from the United States, alleging that the government negligently allowed FAA enforcement personnel to develop and implement an unconstitutional regulatory program. They further alleged that federal employees negligently conducted a base inspection of Mall and negligently carried out proceedings to revoke or suspend aviation certificates and to impose civil fines on plaintiff Knipe.

The government moved to dismiss the complaint and moved for sanctions pursuant to Rule 11. The district court granted the

motion to dismiss, concluding that plaintiffs' claims were barred by res judicata, that the court lacked subject matter jurisdiction, and that the United States was protected by sovereign immunity under [p. 2195] the discretionary function exception to the Federal Tort Claims Act, *see* 28 U.S.C. § 2680(a).

DISCUSSION

Rule 11, prior to its amendment in 1993, provided in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper, that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . .If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it . . . an appropriate sanction . . . .

Fed.R.Civ.P.11 (1992).

Under the version of Rule 11 in effect at the time of the district court's decisions, the imposition of sanctions was [p. 2196] mandatory upon finding a violation of the Rule. Where a district court has imposed sanctions pursuant to this version of the Rule, we review for abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399-405 (1990); *Rodick v. City of Schenectady*. 1 F.3rd 1341, 1350 (2d Cir. 1993). We first consider whether the district court abused its discretion in ruling Smith violated Rule 11, and we then consider the relevance of the 1993 amendment to Rule 11.

A. *Knipe v. Skinner*

In *Knipe v. Skinner*, 146 F.R.D. at 60-61, the district court concluded that Smith violated Rule 11 by filing a complaint that to the best of Smith's "knowledge, information, and belief formed after reasonable inquiry" was not "warranted by

existing law or a good faith argument for the extension, modification, or reversal of existing law." Fed.R.Civ.P.11. An attorney's good faith belief in his or her argument must be supported by an objectively reasonable inquiry into its viability. As we stated in *Eastway Const. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985), "Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed, Simply put, subjective good faith . . . provides [no] safe harbor." *See also Mareno v. Rowe*, 910 F.2d 1043, 1047 (2d Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). We conclude that after an objectively reasonable investigation, no good faith argument was advanced in support of the claims asserted in plaintiffs' complaint.

In *Knipe v. Skinner*, plaintiffs sued for

damages, directly under the Constitution, *see Bivens*, 403 U.S. at 389, thirty-one government officials who perform dis- [p. 2197] cretionary functions. However, as the Supreme Court held in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), "government officials performing dis- [p.2197] cretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Thus, plaintiffs could not have hoped to prevail in the *Bivens* action unless appellees' alleged conduct was clearly violative of plaintiffs' constitutional rights at the time of appellee's actions.

A reasonable investigation of the law at the pertinent time would have revealed that appellees' alleged conduct did not violate any clearly established constitutional

rights of the plaintiffs. Plaintiffs' complaint repeatedly alleged that FAA officials lack authority to commence certificate actions against alleged FAR violators, rather than impose civil money penalties. However, that supposed lack of authority was then, and is now, anything but clearly established, *See* Section 609 of the FA Act, 49 U.S.C. § 1429(a) (1988). Moreover, at the time of the actions alleged in the complaint, *Go Leasing v. National Transp. Safety Bd.*, 800 F.2d 1514 (9th Cir. 1986), in which Smith was counsel, had directly held that FAA officials had the requisite authority.

In light of *Go Leasing's* affirmance of the validity of the FAA enforcement procedures challenges by plaintiffs, Smith cannot credibly argue that appellees could reasonable have known in 1988 that their conduct violated clearly established constitutional rights, *See Harlow*, 457 U.S.

at 818. Moreover, before the present action was brought, three other circuits had followed *Go Leasing* in cases in which Smith was again counsel. *See Rochna v. National Transp. Safety Bd.*, 929 F.2d 13 (1st Cir.), *cert. denied*, 112 S.Ct. 305 (1991); *Tearney v. National Transp* **[p. 2198]** *Safety Bd.*, 868 F.2d 1451 (5th Cir.), *cert. denied*, 493 U.S. 937 (1989); *Komjathy v. National Transp. Safety Bd.*, 832 F.2d 1294 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1057 (1988). As Smith himself conceded n his brief, "anyone reading [*Rochna, Tearney, Komjathy,* and *Go Leasing*] would come away with the belief that the FAA without question has authority to suspend a license for a violation." Indeed, Smith has offered no argument as to why the law of qualified immunity is not fully dispositive of such a *Bivens* action or why that law as expressed in *Harlow* should be extended, modified, or reversed. Smith was therefore properly

sanctioned for bringing the *Bivens* action.

We emphasize that sanctions are not warranted merely because Smith raised legal theories in this circuit that have been rejected in several other circuits. So long as counsel is candid about a legal theory's prior lack of success, honestly seeks to have existing law altered, and has not brought the action for an improper purpose, Rule 11 as it existed prior to the 1993 amendment is satisfied.

Smith argues that *Rochna, Tearney, Komjathy,* and *Go Leasing* do not dispose of all of the claims that plaintiffs asserted, and therefore, he should not be sanctioned. It is true that some of plaintiffs' arguments were no raised in the other cases in which Smith was counsel. However, these causes of action also lacked a good faith basis in law. A number of claims pose novel attacks n the validity of the FA Act and its enforcement mechanisms. For example,

plaintiffs assert that implementation of the FA Act and accompanying regulations denied them their statutory and constitutional rights to a jury trial and deprived plaintiff Valentine of due process. Again, however, because Smith fails to demonstrate in any way that appellees could reasonably [p. 2199] have been aware that their adherence to FAA procedures was clearly unconstitutional, sanctions were properly imposed with respect to these claims.

The remaining claims allege improper delegation of authority, violation of the FA Act by failing to cooperate with Mall employees during inspection, violation of FAA policy by appointing an improper team leader to head the Mall inspection, and blacklisting of Valentine and Ford. These allegations also provide grounds for sanctions, because Smith offers no authority demonstrating that appellee's

alleged conduct would violate any clearly established constitutional right.

A reasonable investigation would thus have revealed that the complaint was untenable under the existing law of qualified immunity. Because Smith makes no argument for the extension, modification, or reversal of that body of law, the district court's ruling that he violated Rule 11 was not an abuse of discretion.

B. *Knipe v. United States*

The complaint field in *Knipe v. United States*, which was based on the same facts as *Knipe v. Skinner*, alleged "negligent supervision and training by [FAA officials] of those DOT, FAA and NTSB employees engaged in rulemaking and regulatory enforcement activities." As in *Knipe v. Skinner*, the complaint relied in large part upon previously rejected legal theories challenging the validity of the FAA enforcement procedures. Dismissing the

complaint of grounds of res judicata, lack of subject matter jurisdiction, and immunity of the United States under the discretionary function exception to the FTCA, the district court stated, "it's clear . . . that why you [Smith] are doing is simply attempting another creative avenue to [p. 2200] beat a head horse. . . . Attempting to disguise the [same] arguments as an action sounding in tort does not cloak them with validity."

In *Knipe v. United States*, 151 F.R.D. 24 (N.D.N.Y.) 1993), the district court imposed sanctions against Smith, concluding that in filing the complaint four days after dismissal of *Knipe v. Skinner*, Smith had "violated Rule 11 by interposing a pleading that has no good faith basis in the law for an improper purpose." *Id.* at 26. We hold that the district court's ruling that Smith violated Rule 11 was not an abuse of discretion.

In *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832 (9th Cir. 1986), the Ninth Circuit held that, "[w]ithout question, successive complaints based upon propositions of law previously rejected may constitute harassment under Rule 11." It also held, however, that is a complaint is well-grounded in fact and warranted by existing law, it cannot be considered harassing under Rule 11. *Id.; accord National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees*, 844 F.2d 216, 223 (5th Cir. 1988). In this case, we need not reach the issue of whether a complaint that is warranted by existing law may be sanctionable if filed for the improper purpose of harassment, because we agree with the district court that plaintiffs' complaint was both lacking a good faith basis in law and intended to harass the FAA.

Knipe v. United States recasts many of

Knipe v. Skinner's claims as tort claims, in large part relying upon the same arguments respecting FAA enforcement procedures rejected in *Rochna, Tearney, Komjathy*, and *Go Leasing* Although an attorney should not be deterred by Rule 11 from seeking to raise in one circuit an argument rejected in another, reasserting those arguments in a new com- [p. 2201] in a district court four days after that court has rejected those arguments in the context of the dame factual circumstances affords grounds for finding that the new pleading was interposed for an improper purpose. Smith' failure to distinguish the underlying legal theories rejected in *Knipe v. Skinner* from the theories advanced in *Knipe v. United States* evidences a lack of good faith argument for the extension, modification, or reversal of existing law.

We also agree with the district court that the filing of the second complaint on

the heels of the dismissal of *Knipe v. Skinner* reveals an improper purpose. Smith offered no reason why his theory of liability under the FTCA could not have been included in his first complaint, nor has he offered any reason why his arguments respecting the validity of FAA enforcement procedures would receive more favorable treatment the second time round. Thus, the district court's conclusion that Smith appears to be "pursuing a personal agenda against the FAA" is supported by the record.

We conclude that the district court did not abuse its discretion in holding that the *Knipe v. United States* complaint lacked a good faith basis in law and was filed for an improper purpose. The district court therefore properly imposed sanctions under the Rule 11 in effect at the time of its decision.

C. *1993 Amendment to Rule 11*

Since the district court's decisions, Rule 11 has been amended. The amended version provides, in relevant part:

> (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other [p. 2202] paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1), it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law . . . . (c) Sanctions. If, after a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court *may* . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(emphasis added). Thus, under the amended version, the imposition of sanctions for a Rule 11 violation is discretionary rather than mandatory. In addition, to avoid sanctions, arguments for extensions,

modifications, or reversals of existing law must now be supported by a "nonfrivolous," rather than "good faith" argument.

The amendment is effective December 1, 1993, and "applicable to all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings in civil cases then pending." Because Rule 11 sanctions should be imposed with caution, *see, e.g., Rodick*, 1 F.3rd at 1351; *Morristown Daily Record v. Graphic Comm. Local 8N*, 832 F.2d 31, 31 n. 1 (3rd Cir. 1987), we conclude that a just and practicable application of the amended Rule 11 requires that the district court be afforded an opportunity to exercise its discretion whether to impose sanctions under the amended version.

[p. 2203] However, on remand the district court should otherwise adhere to the version of Rule 11 in effect at the time of its prior decisions. Any further

retroactive application of the amended Rule 11 would charge Smith with knowledge of a rule not in effect at the time of filing and therefore would not advance Rule 11's central goal of deterring baseless filings. *See Cooter & Gell*, 496 U.S. at 393.

Remanded, no costs.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a state term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of May one thousand nine hundred and ninety-four.

Filed May 19, 1994

Richard X. Knipe, et al
Plaintiffs,

Lawrence B. Smith, Esq.
Appellant,

v.

Samuel K. Skinner, et al
Defendants-Appellees

A petition for rehearing having been filed herein by Appellant Lawrence B.

Smith, Esq. in the above entitled matter,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

For the Court
George Lange III, Clerk
By:
Carolyn Clark Campbell

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD X. KNIPE, GLENN A VALENTINE, and BERNARD C. FORD,

Plaintiffs,

-against- No. 91-CV-1338

SAMUEL K. SKINNER, Secretary of the Department of Transportation; JAMES B. BUSEY, IV, Administrator of the Federal Aviation Administration; et al.

Defendants.

APPEARANCES:
LAWRENCE B. SMITH
Tucson, Arizona
For Plaintiffs

UNITED STATES DEPT. OF JUSTICE
Torts Branch, Civil Division
Washington, D.C.
HELENA GOLDBERG

REBECA O. HIDALGO
NINA PELLETIER
For Defendants

THOMAS J. MCAVOY, District Judge

MEMORANDUM DECISION & ORDER

In a decision rendered from the bench on Ocotober 23, 1992 the court granted defendants' motion to dismiss the complaint in its entirety. Pursuant to an order signed by the court on October 26, 1992, the Clerk entered judgment in favor of the defendants on October 27, 1992. On November 20, 1992 Plaintiffs appealed that decision and judgment.

Prior to the filing of the Notice of Appeal, on November 11, 1992 the defendants filed a motion for sanctions pusuant to Fed.R.Civ.P.11. In a letter to the court dated December 8, 1992, Plaintiffs' counsel informed the court that he did not intend to respond to the motion for sanctions unless the court [p. 2] issued an order to show cause. Also in this letter Plaintiffs'

counsel suggested that the appropriate procedure for considering such a motion was by order to show cause, and requested that he be given a hearing on the motion and the opportunity to conduct discovery.

In response to this letter, a Memorandum to all Counsel, dated December 16, 1992 was issued by the court which directed Plaintiffs' counsel to file opposition papers on or before 1/1/93 or to advise the court of his intention not to oppose the motion. On December 28, 1992 Plaintiffs' counsel filed his opposition to the motion for sanctions, which included a request for a continuance of the motion pending appeal and a hearing on the issue of sanctions. In an order dated January 22, 1993, the court denied Plaintiff's request for a continuance and a hearing, and directed him to respond in writing to the instant motion for sanctions. For the reasons discussed below, the defendants' motion for sanctions

is granted.

DISCUSSION

A

Sanctions under Fed.R.Civ.P. 11 should only be employed when necessary to deter frivolous conduct and curb abuses of the courts. See generally Cooter & Gell v. Harmarx Corp., --- U.S. ---, 110 S.Ct. 2447, 2457 (1990) (Rule 11 is directed at curbing abuses in the judicial system). Moreover, the sanction imposed should only be that amount "thought reasonable to serve the sanctioning purpose of the rule." Eastway Construction Corp. v. [p. 3] The City of New York, 821 F.2d 121, 123 (2d Cir.), *cert. denied*, 484 U.S. 918, 108 S.Ct. 269 (1987). By requiring at attorney to sign all pleadings, motions and other papers filed with the court, Rule 11 places primary responsibility on the signing party for making a reasonable inquiry into the basis for the signed document. The

attorney's signature constitutes a certificate that he/she

> "has read the pleading, motion, or other paper; that to the best of the signer's knowledge, nformation, and belief formed after reasonable inquiry *it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose . . .*" Fed.R.Civ.P.11 [emphasis added].

If such a document is signed in violation of the Rule, the court "shall" impose sanctions. Indeed, once a violation of Rule 11 is found, the imposition of sanctions is mandatory. See O'Malley v. New York City Transit Authority, 896 F.2d 704, 706 (2nd Cir. 1990); Norris v. Grosvenor Marketing Ltd., 803 F.2d 1281, 1288 (2d Cir. 1986).

In determining whether a violation of Rule 11 has occurred, the court applies an objective standard, rather than a subjective one. Eastway Construction Corporation v. City of New York, 762 F.2d 243 (2d Cir. 1985), *cert. denied*, 484 U.S. 918, 108 S.Ct. 269 (1987). If at the time a

complaint is signed, it is not well grounded in fact and warranted by either existing law or a *good faith* argument for the extension or modification of the law, the rule has been violated. Likewise, where it is clear that the pleading is interposed for an improper purpose the rule is violated. However, a party seeking sanctions need [p. 4] not prove both lack of good faith basis and improper purpose, proof of either will justify the sanctions. See Id. at 254.

In determining whether a pleading lacked a good faith basis the court must be mindful of the fine "line between zealous advocacy and frivolous conduct." United States v. International Brotherood of Teamsters, 948 F.2d 1338, 1343 (2d Cir. 1991). The court in Eastway Construction warned that "we do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law", and then

directed that "any and all doubts must be resolved in favor of the signer." Eastway, 762 F.2d at 254.Therefore, "not all unsuccessful legal arguments are frivolous or warrant sanction." Mareno v. Rowe, 910 F.2d 1043, 1047 (2d Cir. 1990), *cert. denied*, --- U.S. ---, 111 S.Ct. 681 (1991). Only where it is "patently clear" at the time of the signing that a claim has no chance of success *under existing law*, and where no reasonable argument can be advanced to modify existing law are sanctions warranted.

Here, the defendants argue in support of their motion that the complaint signed by Plaintiffs' counsel lacked any good faith basis in law; and that it was interposed solely for the purpose of harassment.

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1057 (1988). Plaintiffs' counsel argues here, as he did in opposition to the motion to dismiss, that these cases were wrongly

decided.

Instead of attempting to distinguish the various decisions of the courts of appeals cited by Defendants, Plaintiff's counsel provides the court with his own legal analysis of the issue presented by the instant complaint and the complaints in the cases relied upon by Defendants. Essentially, he argues that his law review article, Smith, FAA Punitive Certificate Sanctions: The Emperor Wears No Clothes; or, How Do You Punish a Propeller?, 14 Trnasp.L.J. 59-100 (1985), points out the mistakes made by the courts of appeals on the issues involved.

Although the district courts consider the wisdom of legal scholars that is found in law review articles, scholarly treatises and the like, there can be no doubt that decisions of the courts of appeals, on the other hand, are of precedential value. Certainly, this is not to suggest that

counsel should hesitate to express disagreement with the decisions of the courts of appeals. Indeed, where counsel makes a reasonable argument for the extension, modification, or reversal of such decisions he/she is protected from Rule 11.

As defendants point out, the court of appeals decisions [p. 6] principally relied upon in the motion to dismiss were all decided after publication of Plaintiff's counsel's article. Therefore, the pleading signed in this matter had no chance of success under the law existing at the time. But there can be no dispute that Plaintiff's counsel is arguing for a modification, indeed a reversal, of that existing law. The central issue there is whether this argument is a reasonable one.

Because Plaintiff's counsel has advanced the arguments contained in his law review article to the Ninth, First, Fifth and

District of Columbia Circuits with no success, and has provided this court with no arguments that the Second Circuit would receive these arguments with any more favor, applying the objective standard discussed above, and resolving all doubts in favor of the non-movant, the court finds that Plaintiff's counsel's arguments are not reasonable. Plaintiff's counsel has crossed the line between zealous advocacy and frivolous conduct. He has provided this court with no intervening Supreme Court or court of appeals decisions which would support his legal theories: instead he simply asserts that the courts are wrong.

The court does not question Plaintiff's counsel's personal beliefs, nor does the court find that those beliefs are anything but completely sincere. And for this reasons, the court cannot find that the complaint was interposed for an improper purpose such as harassment. However, the

precise arguments advanced in this court have been soundly rejected by the courts of appeals for the Ninth, First, Fifth and District of Columbia Circuits; and notwithstanding those decisions Plaintiff's counsel persists [p. 7] in making these arguments. As this court's October 23, 1992 decision makes clear, the instant complaint has no basis in existing law, and Plaintiff's counsel has not makde a reasonable argument for modification of that law. Therefore, the court finds that Rule 11 has been violated and that sanctions are warranted.

CONCLUSION

Based upon the foregoing discussion, the courts finds that Plaintiff's counsel violated the provisions of Fed.R.Civ.P.11 and therefore sanctions under that rule are warranted. Defendants have until March 1, 1993 to file and serve any submissions concerning the appropriate amount of

sanctions, and Plaintiff's counsel has until March 10, 1993 to file and serve any opposition thereto.

IT IS SO ORDERED.

Dated at Binghamton, New York

February 20, 1993 /s/ Thomas J. McAvoy
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD X. KNIPE, GLENN A. VALENTINE, and BARNARD C. FORD,

Plaintiffs,

-against- 91-CV-1338

SAMUEL K. SKINNER, Secretary of the Department of Transportation; et al.

Defendants.

Original filed:
Mar 23, 1993

APPEARANCES:
LAWRENCE B. SMITH
Tucson, Arizona
For Plaintiffs

UNITED STATES DEPT. OF JUSTICE
Torts Branch, Civil Division
Washington, D.C.
HELENA GOLDBERG
For Defendants

THOMAS J. MCAVOY, District Judge

ORDER

In a Memorandum-Decision & Order dated February 20, 1993 this court determined that plaintiff's counsel had violated the provisions of Rule 11 of the Federal Rules of Civil Procedure. Defendants were to file and serve any submissions concerning the appropriate amount of sanctions on or before March 1, 1993. Plaintiff's counsel was directed to respond thereto on or before March 10, 1993. Defendants filed their submission in support of the appropriate amount of sanctions on March 1, 1993, and plaintiff's counsel has not responded.

An appropriate measure of sanctions under rule 11 is generally the opposing party's attorney's fees. However, that amount must be reasonble. The sanction imposed should only be [p. 2] that portion of the attorney's fees "thought reasonable

to serve the sanctioning purpose of the rule." Eastway Construction Corp. v. The City of New York, 821 F.2d 121, 123 (2d Cir. 1987). In their submissions defendants request that the court award sanctions in the amount of $9,212.39. This amount represents attorney's fees in the amount of $8,649.16 and travel expenses in the amount of $553.23. The rate requested for attorney's fees is $59.24 per hour.

Included in the amount of attorney's fees requested is time spent by counsel preparing a memorandum for the appeal of this matter. The court is of the opinion that time spent on the appeal of this matter is not an appropriate component of sanctions at this stage. If it is determined by the Court of Appeals that the appeal is also a violation of Rule 11, then time spent responding thereto may be an appropriate component at that stage. However, here the court will not consider

such time in the computation of the amount of sanctions.

Plaintiff's counsel was given ten days to respond to defendants' submissions. However, as of the date of this order, plaintiff's counsel has not yet responded to defendants' submissions regarding the amount of sanctions to be imposed. Therefore, having considered all of the facts and circumstances of this case and the defendants' most recent submissions, the court finds that the purposes of Rule 11 will be served by sanctions against plaintiff's counsel in the amount of $9,000.00. [p. 3]

IT IS SO ORDERED

Dated at Binghamtom, New York
March 20, 1993

/s/Thomas J. McAvoy
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD X. KNIPE, GLENN A. VALENTINE,

and BARNARD C. FORD,

v. JUDGEMENT IN A CIVIL CASE

SAMUEL K. SKINNER, Secretary of the Department of Transportation; et al.

Case Number 3:91-CV-1338 (TJM)

IT IS ORDERED AND ADJUDGED; that the Court finds that the purposes of Rule 11 will be served by sanctions against Plaintiff's counsel in the amount of $9,000.00; as in accordance with Judge McAvoy's Order dated March 20, 1993.

March 25, 1992 /s/ Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

RICHARD X. KNIPE, GLENN A. VALENTINE, and BARNARD C. FORD,

Plaintiffs,

-against- 92-CV-1389

UNITED STATES OF AMERICA

Defendant.

Original filed:
Aug. 19, 1993

APPEARANCES:

LAWRENCE B. SMITH
Tucson, Arizona
For Plaintiffs

UNITED STATES DEPT. OF JUSTICE
Torts Branch, Civil Division
Washington, D.C.
ROBERT A.K. DOEHL
WENDY L. ROME
For Defendants

THOMAS J. MCAVOY, District Judge

DECISION & ORDER

Plaintiffs were the subjects of certain orders of the Federal Aviation Administration (FAA) concerning alleged safety violations in the summer and fall of 1988. The instant action is the second of two actions filed by plaintiffs' counsel challenging the FAA's enforcement authority in issuing the orders. In the first of the two actions, Knipe v. Skinner, 91-CV-1338 (TJM), plaintiffs' counsel challenged this authority and sought damages for violations of plaintiffs' civil rights under Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999 (1971). For the reasons expressed by the court on October 23, 1992,

that case was dismissed. Plaintiffs unsuccessfully appealed that ruling to the Second Circuit Court of Appeals. See [p. 2] Knipe v. Skinner, --- F.2d ---, 1993 WL 285340 (2d Cir. August 2, 1993). In a later decision, reported at 146 F.R.D> 58, the court found that plaintiffs' counsel had violated Rule 11 of the Federal Rules of Civil Procedure by filing the Knipe v. Skinner complaint. After giving plaintiffs' counsel an opportunity to contest the amount of sanctions requested by defendants, the court issued an order March 20, 1993 which imposed sanctions on plaintiffs' counsel in the amount of $9,000.00. That order is currently pending appeal to the Second Circuit Court of Appeals.

Four days after the court dismissed the first action, plaintiffs' counsel brought the instant action, which is based upon the same set of facts as the first action, but

seeks recovery under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* In a decision rendered from the bench on April 12, 1993 the court granted defendant's motion to dismiss the complaint pursuant to Fed.R.Civ.P.12(b)(6). First, the court ruled that inasmuch as the complaint stated the same claims as the complaint in Knipe v. Skinner, it was dismissed upon the principles of *res judicata.* However, the court also ruled that it lacked subject matter jurisdiction over the case; and further that the allegations in the complaint fell within the discretionary function exception to the waiver of sovereign immunity contained in the Federal Tort Claims Act. The clerk entered judgment accordingly on April 30, 1993.

In addition to moving for dismissal of the action, [p.3] defendant also moved for the imposition of sanctions pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. § 1927.

Defendant argues that plaintiffs' counsel has advocated arguments already rejected and that he has filed the instant complaint for an improper purpose. Plaintiffs' counsel had not adequately responded to the motion for sanctions at the time of oral argument; therefore, the court reserved decision on that motion and directed plaintiff's counsel to submit his response in writing. Now, having considered the arguments for and against the imposition of sanctions, for the reasons expressed below the court finds that Rule 11 of the Federal Rules of Civil Procedure has been violated and that sanctions are justified.

As this court stated in Knipe v. Skinner, "[i]n determining whether a violation of Rule 11 has occurred, the court applies an objective standard, rather than a subjective one. Eastway Construction Corporation v. City of New York, 762 F.2d 243 (2d Cir. 1985), *cert. denied*, 484 U.S.

918, 108 S.Ct. 269 (1987)." 146 F.R.D. at 60. Sanctions are justified under Rule 11 where a pleading is interposed for an improper purpose, or where a pleading lacks a good faith basis in in the law. Id. Although plaintiffs' counsel brought this second case under the Federal Tort Claims Act, his arguments concerning enforcement authority of the FAA are no different than they were in the prior action. And as noted in Knipe v. Skinner, plaintiffs' counsel has advanced the same arguments "to the Ninth, First, Fifth and District of Columbia Circuits with no success," id. at [p. 4] 61; therefore applying an objective standard, the court finds that plaintiffs' counsel's unfailing persistence in pursuing these frivolous arguments alone warrants sanctions under Rule 11.

The court recognizes that plaintiffs' counsel asserts at page 29 of his memorandum in opposition to the motion for

sanctions that "[t]he core issues in this case have nothing to do with attacking FAA enforcement authority . . ." Be that at is may, the court finds that the central focus of plaintiffs' counsel's arguments, and the central focus of the instant complaint, is the FAA enforcement authority. Several pages of plaintiffs' counsel's response to the motion to dismiss and his response to the motion for sanctions are devoted to advancing the same arguments as were previously rejected. As the court stated in its oral decision on April 12, 1993,

> "it is crystal clear that plaintiffs' counsel is simply attempting another creative avenue to beat a dead horse. The root of this action, the previous one decided by this court, and countless other actions filed by plaintiffs' counsel is his own personal belief that the Federal Aviation Administration lacks the authority to do what it has done in this case."

Not only has plaintiffs' counsel failed to recognize the error of his ways concerning these arguments, and therefore violated Rule 11; but the court finds that the

instant action was filed with an improper purpose in violation of Rule 11. Cf. Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986) ("Without question, successive complaints based upon propositions of law previously rejected amy constitute [p. 5] harassment under Rule 11").

The first of plaintiffs' two actions, Knipe v. Skinner, was dismissed by the court on Friday, October 23, 1992. The following Tuesday, just four days after the first action was dismissed, plaintiffs' counsel filed the instant action which, as previously noted, sought to relitigate many of the same issues already decided. He attempted to disguise this action under one under the Federal Tort Claims Act. However, at no time prior to the dismissal of the first action did plaintiffs' counsel advance this new-found theory of liability, nor did he ever seek to amend the first

complaint to include this novel approach. These facts, along with the fact that counsel's arguments have been repeatedly rejected by district courts and circuit courts alike, lead the court to conclude that the instant complaint was filed with n improper purpose.

In Knipe v. Skinner this court stated that it did "not question Plaintiffs' counsel's personal beliefs, nor [did] the court find that those beliefs are anything but completely sincere. And for this reason, the court [did] not find that the complaint was interposed for an improper purpose such as harassment." Knipe, 146 F.R.D. at 61. The court remains unwilling to question the strength of plaintiffs' counsel's personal beliefs, or indeed the sincerity with which he advocates them. His sincere devotion to these beliefs is apparent from the papers submitted, his oral presentations to the court, and his

law review article, *Smith, FAA Punitive* [p. 6] *Certificate Sanctions: The Emperor Wears No Clothes; or, How Do You Punish A Propeller?*, 14 Trans.L.J. 59-100 (1985). However, his persistence in advocating these arguments suggest to the court that he is pursuing a personal agenda against the FAA. The court is unwilling to permit plaintiffs' counsel to advocate previously rejected arguments incognito solely as a back door attempt to further his personal agenda against the FAA. Plaintiffs' counsel has again crossed the line between zealous advocacy and frivolous conduct.

CONCLUSION

Base upon the foreoing discussion, the court finds that plaintiffs' counsel has violated Rule 11 by interposing a pleading which has not good faith basis in law for an improper purpose. In light of this finding, the court need not reach defendant's arguments under 28 U.S.C. §

1927. Defendant's counsel has until August 27, 1993 to file and serve any submissions concerning the appropriate amount of sanctions, and plaintiffs' counsel has until September 3, 1993 to file and serve an opposition thereto.

IT IS SO ORDERED

Dated at Binghamtom, New York
August 14, 1993

/s/ Thomas J. McAvoy
Chief U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Filed Sep. 28, 1993

RICHARD X. KNIPE, GLENN A. VALENTINE, and BARNARD C. FORD,

Plaintiffs,

-against- 92-CV-1389

UNITED STATES OF AMERICA

Defendant.

THOMAS J. MCAVOY
Chief U.S. District Judge

ORDER

In an Order dated August 14, 1993 this

court determined that plaintiff's counsel had violated the provisions of Rule 11 of the Federal Rules of Civil Procedure. Defendants were to file and serve any submissions concerning the appropriate amount of sanctions on or before August 27, 1993. Plaintiff's counsel was directed to respond thereto on or before September, 3, 1993. Defendants' submission in support of the appropriate amount of sanctions was filed on August 30, 1993 and plaintiff's counsel has not responded.

An appropriate measure of sanctions under Rule 11 is generally the opposing party's reasonable attorney's fees. In their submissions defendants request that the court award sanctions in the amount of $7,252.89. This amount represents attorney's fees expended by the United States Department of [p. 2] Justice in the amount of $5,821.99 and travel expenses in the amount of $512.82. This amount also

represents costs to the Federal Aviation Administration in the amount of $918.08 for defending against this suit.

Plaintiff's counsel was given seven days to respond to defendants' submissions. However, as of the date of this order, plaintiff's counsel has not yet responded to defendants' submissions regarding the amount of sanctions to be imposed. Therefore, having considered all of the fact and circumstance of this case and the defendants' most recent submissions, the court finds that the purposes of Rule 11 will be served by sanctions against plaintiff's counsel in the amount of $7,252.89.

IT IS SO ORDERED

Dated at Binghamton, New York
September 28, 1993

/s/ Thoms J. McAvoy
United States District Judge

Filed Oct. 1, 1993

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

RICHARD X. KNIPE, GLENN A. VALENTINE, and BARNARD C. FORD,

V. 92-CV-1389

UNITED STATES OF AMERICA

IT IS ORDERED AND ADJUDGED; that on the remaining issue of Rule 11 Sanctions that the Court finds that the purposes of Rule 11 will be served by sanctions against Plaintiff's counsel in the amount of $7,252.89; as in accordance with Judge McAvoy's Order dated September 28, 1993.

October 1, 1993 /s/ Deputy Clerk

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

No. 91-CV-1338

RICHARD X. KNIPE, and GLENN A. VALENTINE, and BERNARD C. FORD,
Plaintiffs,

v.

SAMUEL K. SKINNER, Secretary, Department of Transporation, **JAMES B. BUSEY IV**, Administrator, Federal Aviation Administration, **C. DEAN MCGRATH JR.**, Acting General Counsel, Department of Transportation, **NEIL R. EISNER**, Assistant General Counsel, Department of Transportation, **KENNETH P. QUINN**, Chief Counsel, Federal Aviation Administration, **GREGORY S. WALDEN**, former Chief Counsel, Federal Aviation Administration, **DANIEL D. CAMPBELL**, General Counsel, National Transportation Safety Board, **JOHN M. STUHLDREHER**, former General Counsel, National Transportation Safety Board, **JOHN H. CASSADY**, Deputy Chief Counsel, Federal Aviation Administration, **DONALD P. BYRNE**, Assistant Chief Counsel, Federal Aviation Administration, **PETER J. LYNCH**, lawyer, Federal Aviation Administration, **MARDI R. THOMPSON**, lawyer, Federal Aviation Administration, **KAREN R. BURY**, lawyer, Federal Aviation Administration, **JOSEPH A. CONTE**, lawyer, Federal Aviation Administration, **HARRY S. GOLD**, lawyer, Federal Aviation Administration, **LORETTA E. ALKALAY**, Asst. Chief Counsel, Federal Aviation Administrtion, **RANDY E. HYMAN**, lawyer, Federal Aviation Administration,

BRUNHILDA SANDERS-LANE, lawyer, Federal Aviation Administration, **DANIEL J. PETERSON**, Regional Director, Federal Aviation Administration, **THOMAS ACCARDI**, official, Federal Aviation Administration, **NICHOLAS SABATINI**, official, Federal Aviation Administration, **CHARLES G. O'NEILL**, official, Federal Aviation Administration, **ROY E. JOHNSEN**, former official, Federal Aviation Administration, **MARINUS "RENE" KOCH**, inspector, Federal Aviation Administration, **STEPHEN W. SMITH**, inspector, Federal Aviation Administration, **MARTIN J. INGRAM**, inspector, Federal Aviation Administration, **ROBERT E. MARTIN**, official, Federal Aviation Administration, **GEORGE E. MURGITROYDE**, official, Federal Aviation Administration, **MARC PANDELOGLOU**, inspector, Federal Aviation Administration, **ROBERT D. MURCHLAND**, inspector, Federal Aviation Administration, **EDWARD HARAHUSH**, inspector, Federal Aviation Administration,

Defendants.

CIVIL COMPLAINT FOR VIOLATION OF CONSTITUTIONAL RIGHTS

Jury demanded

JURISDICTION

1. This is a civil action which seeks compensatory and punitive damages from defendants based on violations of plaintiff's constitutional rights. Jurisdiction arises under 28 U.S.C. § 1331.

PARTIES PLAINTIFF

2. Richard X. Knipe is a resident of Albany County, New York.

3. Glenn A. Valentine is a resident of Albany County, New York.

PARTIES DEFENDANT

4. Samuel K. Skinner, who may be found in Washington, D.C., is Secretary, Department of Transportation (DOT).

5. James B. Busey IV, who may be found in Washington, D.C., is Administrator, Federal Aviation Administration (FAA).

6. C. Dean McGrath Jr., who may be found in Washington, D.C., is Acting DOT General Counsel.

7. Neil R. Eisner, who may be found in Washington, D.C., is Assistant DOT General Counsel for Regulations and Enforcement.

8. Kenneth P. Quinn, who may be found in Washington, D.C., is FAA Chief Counsel.

9. Gregory S. Walden, who may be found in Washington, D.C., is former FAA Chief Counsel.

10. Daniel D. Campbell, who may be found in Washington, D.C., is General Counsel, National Transportation Safety Board (NTSB).

11. John M. Stuhldreher, whereabouts unknown, is former NTSB General Counsel.

12. John H. Cassady, who may be found in Washington, D.C., is FAA Deputy Chief Counsel.

13. Donald P. Byrne, who may be found in Washington, D.C., is FAA Assistant Chief Counsel for Regulations and Enforcement.

14. Peter J. Lynch, who may be found in Washington, D.C., is an FAA lawyer and head of the Office of Chief Counsel Enforcement Proceedings Branch.

15. Mardi R. Thompson, who may be found in Washington, D.C., is an FAA lawyer and head of the Office of Chief Counsel Enforcement Policy Branch.

16. Karen R. Bury, who may be found in Washington, D.C., is an FAA staff lawyer.

17. Joseph A. Conte, who may be found in Washington, D.C., is an FAA staff lawyer.

18. Harry S. Gold, who may be found in Washington, D.C., is an FAA staff lawyer.

19. Loretta E. Alkalay is FAA Assistant Chief Counsel for the agency's Eastern Region.

20. Randy E. Hyman is an FAA staff lawyer now posted to the Southern Region.

21. Brunhilda Sanders-Lane is an FAA staff lawyer posted to Eastern Region.

22. Daniel J. Peterson, is or was Regional Director of the FAA Eastern Region.

23. Thomas Accardi is an FAA official in Washington, D.C., and was former Manager, Eastern Region Flight Standards Division.

24. Nicholas Sabatini, is or was FAA Assistant Manager of the Eastern Region Flight Standards Division.

25. Charles G. O'Neill, who may be found at Clifton Park, New York, is a former FAA

official, now retired, and was Manager of the Albany Flight Service District Office (FSDO).

26. Roy E. Johnsen, is a former FAA inspector, now retired, and was Unit Supervisor for operations inspectors at the Albany FSDO.

27. Marinus "Rene" Koch, is an FAA inspector, formerly posted at the Albany FSDO where he was assistant principal operating inspector for Mall Airways, Inc.

28. Stephen W. Smith, who may be found in Louisville, Kentucky, is an FAA inspector and former Principal Operating Inspector for Mall Airways, Inc.

29. Martin J. Ingram is an FAA inspector posted in the Eastern Region.

30. Robert E. Martin is manager of the Albany FSDO and was former Unit Maintenance Supervisor there.

31. George E. Murgitroyde, who may be found at or near Saratoga, New York, is an

FAA inspector posted at the FAA Albany FSDO and former Principal Maintenance Inspector for Mall Airways, Inc.

32. Marc Pandeloglou is an FAA inspector posted to the Eastern Region.

33. Robert D. Murchland is an FAA inspector posted in the Eastern Region.

34. Edward Harahush is an FAA inspector posted to the Eastern Region.

GENERAL BACKGROUND ALLEGATIONS

35. In 1971 plaintiff Richard X. Knipe started a small commuter airline called Mall Airways, Inc., operating between Albany and Binghamton, New York. Based in Albany, plaintiff, an Air Transport Pilot (ATP) rated airman, utilized a six-place twin-engine Piper Aztec. He soon expanded to serve Elmira, New York. During the 1970s the airline grew steadily, adding more aircraft and serving the New York City metropolitan area at Newark and La Guardia airports. Enjoying continued expansion and

success, including serving Toronto and Montreal, Canada, by 1988 Mall Airways was utilizing seven 19-passenger Beech BE-99 and one 10-passenger Beech A-90 King-Air turbine-powered propeller aircraft. Plaintiff Knipe as of November 1988 owned eighty-seven and one-half percent (87-1/2%) of the outstanding shares in Mall Airways, Inc., the remainder belonging to a few other individuals. Mr. Knipe, always responsible for the overall operation of the air carrier, served in various management positions, as conditions required.

36. Plaintiff Glenn A. Valentine became associated with Mall Airways on an informal basis in the early 1970s, and with the growth of the company was offered a fulltime management position in 1979. He accepted, leaving a management position in the trucking industry which he had held for many years. That position included substantial experience with the regulatory

requirements of the Interstate Commerce Commission. Mr. Valentine also held an ATP. By November 1988 he was serving in the key management and FAA approved position of director of operations of Mall Airways.

37. Through most of its existence, and in 1988, Mall Airways' main base was at Albany County Airport, Albany, New York. Company headquarters were located in offices less than 200 feet from the Federal Aviation Administration's Flight Standards District Office. In October-November 1988 Mall Airways was in sound financial condition.

38. Scheduled carriers such as Mall Airways, which utilize small aircraft (19 passenger seats or less), are issued a certificate (license) to operate under Part 135 (14 CFR pt 135) of the Federal Aviation Regulations (FARs). Each certificate is assigned to a specific FAA field office, generally a Flight Standards District Office (FSDO, or "fizz-doe"). From that

office the operator is assigned a Principal Operations Inspector ("POI"), Principal Maintenance Inspector ("PMI") and Principal Avionics Inspector ("PAI") who, as their titles indicate, are responsible for various areas of a carrier's operations. The POI is concerned with qualifications, training and utilization of flight crews--pilots and flight attendants, as well as related recordkeeping and the conduct and proficiency of any company check airman authorized to perform certain periodic flight checks of company pilots on behalf of the FAA Administrator. All operators are required to create and maintain FAA approved manuals for various operational phases, training, overall company operations, for specific aircraft, and so forth. Same is true of maintenance (airframe and engines), and avionics (radios and other electronic devices).

39. In August 1988, Albany FSDO

operations unit manager defendant Roy E. Johnsen advised Mall Airways by letter that he had assigned a new POI for the company, defendant Stephen W. Smith, the third or fourth POI that year. Plaintiff Glenn A. Valentine, now director of operations, immediately, and repeatedly, invited Smith to spend a day with Mall reviewing its operations. Smith declined, nor did he once come to the facility for a look-around--until much later. For some time up to early 1988 one James Allan had been POI. In January 1988 defendant Johnsen, serving as FSDO unit supervisor in charge of principal operations inspectors, was appointed temporary POI of Mall Airways. Appointed either as assistant POI or to assist him was defendant Marinus "Rene" Koch. Koch effectively served as the real POI until the appointment of defendant Smith in August.

40. In October 1988 defendant Smith

called plaintiff Valentine and advised him that he would be coming to the facility in a few days to make a "base" inspection. He did, and brought with him defendant Koch. Although base inspections are usually routine in the course of POI and PMI duties, Smith and Koch's conduct indicated this one was more than routine and that in fact Koch was the leader. Both Smith and Koch throughout the inspection displayed an antagonistic attitude. Previous relations with Koch had for some time been strained because of his continuing insistence that certain emergency training procedures approved by earlier POIs and their supervisors did not comply with either company manuals or the FARs. The inspection occurred on October 19, 20, 24 and 25. During that time Smith and Koch, although so requested, engaged in almost no communication with Mall Airways management about anything that might have been out of

order. Nor was there any communication after the inspection about any possible discrepancies found, so they could be discussed and, if need be, corrected.

41. Just two weeks later, on or about 8 November 1988 plaintiff Richard Knipe was advised that Mall Airways would be the subject of a "special" inspection beginning the next day. Confined in bed due to a bad back and leg, plaintiff Valentine managed to get to the airport that next day, 9 November. It is strict agency policy that special inspection teams are to be composed mainly of inspectors from other FAA offices not directly familiar with or responsible for the operator and, at the least, led by an inspector not of that particular FSDO office. The team's purpose is a kind of audit to help upgrade both operator compliance and improve its principal inspectors' surveillance techniques and understanding of the multiplicity of rules

governing any commercial operation. Designated to coordinate the team efforts and dispatched from Eastern Region headquarters in Jamaica, New York (adjacent to JFK International Airport) was defendant Martin J. Ingram. On arrival he announced he'd only be there only that day and that the leader for the inspection would be defendant Marinus "Rene" Koch, and inspector in the Albany FSDO. Koch was accompanied by Stephen W. Smith and George E. Murgitroyde, both also of the Albany FSDO, and Robert Murchland from elsewhere in the Eastern Region.

42. Plaintiffs Knipe and Valentine asked Ingram to stay for the entire inspection, pointing out that from prior experience with Koch he could not be objective about the company, especially as he had essentially served as company POI. Ingram promised that he would, but reneged and left early the next day, 10 November. About

3:00 p.m. that same afternoon (the inspection obviously having just started the day before), Koch left the premises, saying he'd "be back in about an hour." He returned sometime after 4:30 p.m., accompanied by defendants Smith and Murchland. He carried with him a letter, obviously prepared earlier but dated that day, that complained that some 23 Mall Airways pilots had not been properly trained in various emergency procedures, either in accordance with Mall's approved training program, or the FARs. Defendant Koch gave the company one hour to produce records confirming that appropriate training, as defined by him, had been completed; and also forbade use of any pilot who had not been so trained. This effectively shut down the airline. And were these commands not complied with, he threatened in his letter, "the FAA will take enforcement action, including possible

emergency action." This special inspection continued for an extended period of time, thereafter.

43. Mall Airways president and owner plaintiff Richard Knipe, within hours, called back all aircraft and crews to home base and, rather than argue with Koch, immediately began the retraining which Koch insisted was the problem. This mostly involved hands-on training, rather than the company training procedures Koch was complaining about, procedures that had been in use for six years. These included training crews in emergency procedures, like aircraft evacuation, use of a fire extinguisher, and so forth, by means of a training video. That video was produced in late 1982 using various company personnel, along with an FAA inspector and the Chief of the Albany County Airport Crash, Fire and Rescue Team, as the actors. It had been used continually and openly starting with

1983. Koch's threat of emergency action was based on his disagreement with these procedures. As late as spring 1988, during company training sessions, this video method was used and again specifically approved by defendant Roy Johnsen, Koch and Smith's superior. Use of the film was specifically authorized in Mall Airways' training manual. Defendant Koch was privy to this and, in fact, had attended those very same spring training sessions.

44. The October base and November special inspections of Mall Airways, and Koch's actions set in motion a course of FAA enforcement actions against Mall Airways, plaintiffs Richard Knipe, Glenn Valentine and other company officials. These actions caused the virtual destruction of Mall Airways: the corporation and certain assets, its Canada certificates, among others, were sold to another carrier. The legal action against plaintiff Glenn

Valentine involved the revocation of his pilot's certificate (as was the case with two other company officials). His revocation order was based on charges arising out of the base and special inspections. Shortly after the November shutdown he was forced out of his job and blacklisted by the FAA, thus preventing him from obtaining similar employment in the aviation industry.

45. Even though plaintiff Knipe had brought all planes and crews home, and trained them according to defendant Koch's mandates, the company was not thereafter allowed to resume operation until the special inspection was complete. Accepting defendant Koch's contentions without scrutiny, and those of the same team when later headed by defendants Pandeloglou and Harahush, defendants Loretta E. Alkalay, Assistant Chief Counsel for the FAA Eastern Region, Daniel J. Peterson, Regional

Director, Thomas Accardi, Manager, Flight Standards Division, and Nicholas Sabatini, his assistant manager, continued the threat of using an emergency order of revocation and forced the company because of it to sign a consent order in lieu of such formal legal action, and by which it agreed to remain shut down until allowed to return to operation by these same defendants.

46. More than two months later, Mall Airways resumed operation, shortly after which it was sold. On 6 November 1990, continuing the course of action initiated against plaintiff Knipe and his company Mall Airways, defendant Loretta Alkalay filed a complaint against Knipe in the agency's new Civil Penalty [test] Demonstration Program (CPDP), seeking civil-money fines, using charges arising out of the base and special inspections. It was on 18 January 1990, that defendant

Alkalay issued the order revoking Valentine's ATP.

47. The CPDP charges against Knipe were dismissed by a DOT-FAA Administrative Law Judge (ALJ) 20 March 1991, because defendant Alkalay had not properly served the complaint. Defendant Alkalay initiated an appeal of this decision, but the FAA Office of Chief Counsel in Washington, D.C., withdrew it on 24 May 1991, thus finally ending the course of legal actions begun in November 1988 against Knipe and Mall Airways, Inc.

48. The ATP revocation case brought by defendant Alkalay against plaintiff Valentine, and two other Mall Airways management personnel, went to hearing before an NTSB ALJ. The case was prosecuted by defendant FAA lawyers Randy E. Hyman and Brunhilda Sanders-Lane. The ALJ, after two days of trial, rejected charges of fraudulent record entries, and dismissed

the remainder as being "stale," that is, not timely filed. In short, she found totally for Valentine and the others. Defendant Alkalay appealed this decision, and the matter at this time remains pending before the full five-member NTSB Board.

49. At times relevant to the claims made herein: defendant Samuel K. Skinner, as Secretary, Department of Transportation (DOT), had overall responsibility for the various modalities of that Department, including the Federal Aviation Administration (FAA); James B. Busey IV, as FAA Administrator, was directly responsible by law and delegation of authority from Secretary Skinner, for all agency actions.

50. At times relevant to the claims made herein, the following defendants were responsible for supervising, implementing and conducting the FAA's regulatory enforcement program at both DOT and FAA headquarters in Washington, D.C.: C. Dean

McGrath, Jr., Acting DOT General Counsel; Neil R. Eisner, DOT Assistant General Counsel for Regulations and Enforcement; Kenneth P. Quinn, FAA Chief Counsel; Gregory S. Walden, former FAA Chief Counsel; John H. Cassady, FAA Deputy Chief Counsel; Donald P. Byrne, FAA Assistant Chief Counsel for Regulations and Enforcement; Peter J. Lynch, FAA lawyer, head of the FAA Chief Counsel Office Enforcement Proceedings Branch; Mardi R. Thompson, FAA lawyer, head of the FAA Chief Counsel Office Enforcement Policy Branch; Karen R. Bury, FAA staff lawyer; Joseph A. Conte, FAA staff lawyer; Harry S. Gold, FAA staff lawyer.

51. At times relevant to the claims made herein, the following defendants were directly responsible for either the initiation, supervision or conduct of the various enforcement actions taken against plaintiffs and Mall Airways, Inc. from and

after November 1988: Loretta E. Alkalay, Assistant Chief Counsel, FAA Eastern Region; Daniel J. Peterson, Director, FAA Eastern Region; Thomas Accardi, Manager, Flight Standards Division; his assistant manager, Nicholas Sabatini; Randy E. Hyman and Brunhilda Sanders-Lane, staff lawyers, FAA Eastern Region; and defendant former FAA chief counsel Gregory S. Walden.

52. At times relevant to the claims made herein, the following defendants had overall responsibility for legal affairs of the National Transportation Safety Board and its handling of FAA certificate actions appealed to the Board: Daniel D. Campbell, NTSB General Counsel; John M. Stuhldreher, former NTSB General Counsel.

53. At times relevant to the claims made herein, the following defendants, as FAA officials, had overall responsibility for the initiation, conduct, and handling of the base and special inspections of Mall

Airways during October 1988 to January 1989, and for recommending the enforcement actions taken thereafter against the airline and plaintiffs: Daniel J. Peterson; Thomas Accardi; Nicholas Sabatini; Martin J. Ingram; Charles O'Neill and Roy E. Johnsen.

54. At times relevant to the claims made herein, the following defendants, FAA inspectors or officials, were responsible for and directly involved in the initiation and conduct of the base inspection and continuing special inspection of Mall Airways during October 1988 to January 1989, and made recommendations to superiors and agency legal counsel which led to the enforcement actions initiated against Mall Airways, Inc. and plaintiffs Knipe and Valentine: Stephen W. Smith; Martin J. Ingram; Marinus "Rene" Koch; Roy E. Johnsen; Robert Martin; George Murgitroyde; Marc Pandeloglou; Robert D. Murchland;

Edward Harahush.

55. FAA officials, after investigation and a determination to initiate enforcement action against a suspected violator has been made, unless only low-level administrative action is taken, choose between initiating civil penalty action or punitive certificate action. This occurs even before the alleged violator is given notice he is being charged. The former, with the recent exception to be noted, carries with it the right to "demand" jury trial, with the only possible penalty a money fine; the latter affords trial in a one-man administrative hearing with right of appeal to the full five-member National Transportation Safety Board; the only possible penalty is license suspension or revocation. The United States District Judge has no authority to change the money-fine to a license suspension, no matter how heinous the offense; the Board cannot

change suspension or revocation to a money fine, no matter how severe and disproportionate the impact might be, for instance, on a professional pilot who could lose months of wages, indeed, his job, or an entire business shut down. Ironically, an unlicensed person, who commits the same violation, because there is no certificate to proceed against, is guaranteed his right to be tried in United States District Court with the right to "demand" trial by jury of any fact, as has been provided in law since 1926 or, at the least, pay only a money fine.

56. The Administrator, through his delegated subordinates, pursuant to the claimed authority of FA Act sections 609 and 1005(a), 49 U.S.C. § 1429(a) & 1485(a), oftimes declares an emergency exists requiring the immediate effectiveness of a suspension or revocation order (almost always revocation). Revocations for a true

lack of qualifications are rare: such as, when a pilot has an accident and then fails a flight test. Almost always, emergency revocations are based either on the perceived seriousness of a single violation, like flying under the influence or, in the case of an operator, on a series of alleged violations which usually have occurred over a period of time but are discovered in a narrow time-frame during inspection of company records. Although some are often one, two or three years old, these are lumped together in a single order and revocation justified because the violations demonstrate that the pilot, mechanic or operator lacks the "care, judgment, and responsibility" required by the FAA of any certificate holder. In other words, maintaining such a standard is a qualification of holding the certificate and a "rule" of the agency. Within both FAA and NTSB it is also known as the

"Compliance Disposition" rule. The emergency power is used on grounds the continued exercise of the privileges of the particular certificate by its holder constitutes an immediate threat to air safety and the public.

CLAIMS FOR RELIEF

57. The threatened use of an emergency order of revocation against the operating certificate of Mall Airways, Inc., the inititation of a civil-penalty complaint against plaintiff Richard X. Knipe, and the initiation of a revocation action against plaintiff Glenn A. Valentine as punishment for alleged violations of air-safety rules, violated plaintiffs' Fifth Amendment Right not to be deprived of life, liberty, or property, without due process of law; plaintiffs' right to jury trial as afforded by the Federal Aviation Act of 1958; plaintiffs' Sixth Amendment Right to a speedy and public trial by an impartial

jury where the crime (offense) shall have been committed; and plaintiffs right not to be blacklisted in the aviation industry and have imposed on them a Bill of Attainder. These constitutional violations occurred as a result of the acts and omissions of defendants, and each of them, jointly and severally. More specifically, they are as follows:

FIFTH AMENDMENT RIGHT TO DUE PROCESS

FIRST CAUSE OF ACTION

58. The suspension or revocation of pilot, mechanic or operating certificate by the FAA, threatened or actual, as a penalty or sanction for the violation of one or more FARs has never been authorized by law. Only Congress may constitutionally create penalties, sanctions, or benefits, that is, it may not delegate its *Article I, Section I*, legislative authority to any other branch of the government. This constitutional principle is codified in the

Administrative Procedure Act, 5 U.S.C. § 558. The use of certificate suspensions and revocations as penalties is now and always has been, since the federal government first initiated regulation of aviation through the Air Commerce Act of 1926, a creation of the executive branch, not Congress. FAA threat of the imposition of such penalties on Mall Airways and the actual imposition of same on plaintiff Valentine violated this constitutional principle.

SECOND CAUSE OF ACTION

59. The trial of air-safety violations before the National Transportation Safety Board has never been authorized by law. The only judicial forum authorized by law in 1926, seminal year of federal regulation of aviation, and continuing to the present, was United States District Court. An exception to this is noted: In 1987 the Congress enacted a temporary Civil Penalty Demonstration Program (CPDP). This program

provided for a scheme of administrative hearings within the Department of Transportation for proposed civil fines of $50,000 or less to test the concept and effectiveness of such a system of justice (a sort of Justice of the Peace or traffic court). Jurisdiction continued in district court for fines in excess of that figure. In either case, however, the penalty remains only a money fine. The safety violation charges involved in the cases against Mall Airways, Inc. and plaintiff Knipe were not subject to the CPDP since the FAA rules to implement it, in any event, had not yet been lawfully promulgated. The FAA had no lawful right to threaten Mall Airways with the trial of its alleged safety violations before the NTSB, or to actually prosecute the charges against plaintiff Valentine in that forum.

THIRD CAUSE OF ACTION

60. Since 1926, and at all times relevant

to the issues herein, "any" person who violates "any" air-safety rule, regulation or order has had the absolute right to "demand" trial by jury of any issue of fact, if the value in controversy exceeds $20. FAA use of the Civil Penalty Demonstration Program against plaintiff Knipe, and use of punitve certificate action against plaintiff Valentine, denied both their statutory right to trial by jury.

FOURTH CAUSE OF ACTION

61. The only form of penalty ever authorized by Congress for violations of air-safety rules is the civil-money fine. FAA threat and use of punitive certificate action procedures denied plaintiff Knipe and his company, Mall Airways, Inc., and plaintiff Valentine, their statutory right to pay such a money fine for any violations of which they were found guilty, or agreed to compromise.

FIFTH CAUSE OF ACTION

62. The Federal Aviation Administration has never promulgated a general rule that warns pilot, mechanic or operator that his license is at risk for the violation of any safety rule; nor a rule which advises that the Administrator claims the power to decide in his absolute discretion to have such charges tried administratively before the NTSB, incurring suspension or revocation, rather than in United States District Court or, later, in the CPDP program, with the only penalty a money fine. Agency failure to put such a rule in the Federal Aviation Regulations and cause it to be published in the *Code of Federal Regulations* denied plaintiffs the right to have notice of such an important and critical agency policy which can so drastically affect the property right that an FAA certificate represents. Failure to promulgate such a rule is part of a contin-

uing conspiracy by DOT-FAA officials to coverup their lack of authority for license penalties or to choose them over a money fine, which coverup allowed the threat against Mall Airways to be meaningful.

SIXTH CAUSE OF ACTION

63. The FAA's "rule" that the Administrator may in any given air-safety enforcement case, where the accused holds an FAA certificate, choose between two entirely separate and disparate systems of justice, and by that choice determine how the accused will be punished, even before he's advised he's being charged with a violation, to understate the matter by several magnitudes, has a "substantial" impact on the public. FAA failure to promulgate such a rule, including criteria for how the choice is made, through the public notice and comment requirements of the Administrative Procedure Act denied plaintiffs their right, as an "interested

persons," to participate in such rulemaking. Failure to promulgate such a rule is part of a continuing conspiracy by DOT-FAA officials to coverup their lack of authority for license penalties or to choose them over a money fine, which coverup allowed the threat against Mall Airways to be meaningful and the punitive certificate action to be conducted against plaintiff Valentine.

SEVENTH CAUSE OF ACTION

64. The FAA claims that the FA Act of 1958, section 609, 49 U.S.C. § 1429(a), authorizes the Administrator to impose a license suspension or revocation as an alternative penalty to a civil-money fine, and put the case on a track of administrative justice, rather than in United States District Court with right to jury trial. Since section 609 contains no language that even hints at such power, such as, words like "violation," "offense,"

"sanction," "penalty," "rule," etc., nor mentions civil penalties, such a claim on its face is a statement of general policy and/or an interpretation of general applicability formulated and adopted by the FAA. As such it is required by the Administrative Procedure Act to be published in the *Federal Register*. The FAA has never done so. That failure denied plaintiff his lawful right to be notified by the FAA in the federal government's official publication of record of such policy and the agency's interpretation of its basic charter. Failure to lawfully publish such policy or interpretation is part of a continuing conspiracy by DOT-FAA officials to coverup their lack of authority for license penalties or to choose them over a money fine, which coverup allowed the threat against Mall Airways to be meaningful and the punitive certificate action to be conducted against

plaintiff Valentine.

EIGHTH CAUSE OF ACTION

65. Prior to 1963 the FAA's civil penalty rule faithfully recited the language of the Federal Aviation Act of 1958 concerning civil penalties: "Any person who violates any rule, regulation or order of the Administrator shall be subject to a civil penalty." In 1962 the FAA rewrote this rule to provide that "a person is subject to a civil penalty." This change was published in the *Federal Register* without any notice to the public therein that the agency was reinterpreting its basic charter, and without use of the public notice and comment procedures required by the Administrative Procedure Act. It was clearly made to mislead the public, who might otherwise ask how it was that their pilot's license was being suspended for a violation when the FAA's own rule provided that for "any" violation they "shall be" subject to a

money fine. This surreptitious change, and its perpetuation by the present defendant lawyers of the DOT, FAA and NTSB was a fraud on the public and denied plaintiffs their right under the Administrative Procedure Act to be officially notified of such a reinterpretation of the FAA's basic charter and to participate in its making. It also denied them the right to have their government advise them honestly and forthrightly as to the laws under which they must govern their conduct, rather than deliberately mislead them. DOT-FAA officials continued use of a civil penalty rule which misrepresents the law, as it stands today and has since 1926, is part of a continuing conspiracy to coverup their lack of authority for license penalties or to choose them over a money fine, which coverup allowed the threat against Mall Airways to be meaningful and the punitive certificate action to be conducted against

plaintiff Valentine.

NINTH CAUSE OF ACTION

66. Under the Federal Aviation Act of 1958 all agency authority is vested in the Administrator. (After creation of the Department of Transportation in 1966, it was delegated to him by the DOT Secretary.) By law, in order for other FAA employees or agents to act in his name, the Administrator is expressly required to formally delegate his authority to agency officials for whatever particular purpose it is to be used. The Administrator has never delegated to agency officials, or lawyers, the authority to order the suspension or revocation of a certificate issued by the FAA *as a penalty* for violation of a Federal Aviation Regulation. This failure denied plaintiff Knipe his right to have the authority for the revocation penalty threatened against Mall Airways, and plaintiff Valentine for the

revocation penalty initiated against his pilot's license, officially delegated to the officials who executed it so that they might have lawful notice of the extent of FAA officials' authority and whether they were acting within its boundaries.

TENTH CAUSE OF ACTION

67. It is a fundamental Constitutional requirement that any person, before the government deprive him of life, liberty or property, be given adequate notice to prepare for and the right to participate in a prompt hearing; or, if action must be taken on an immediate basis, such as, might occur with a judicial Temporary Restraining Order (TRO), a hearing be held quickly as possible, always within ten days. The emergency power granted the Administrator in FA Act sections 609(a) and 1005(a), 49 U.S.C. §§ 1429(a) & 1485(a), is unconstitutional on its face: it is tantamount to an executive-branch TRO but provides for no

hearing either before or immediately after the issuance of an emergency order of suspension or revocation, the purpose of which would be to determine whether or not a true emergency exists, or whether FAA officials are abusing the power by using it as punishment, a use contrary to agency policy. DOT-FAA officials are well aware that the NTSB takes the position it has no authority to determine if a true emergency exists, or to do anything about it if they found that it did not. Yet FAA officials have full authority to provide such a hearing, but choose not to use it. Pursuant to the FA Act, section 1007, 49 U.S.C. § 1487, FAA officials have a Congressional mandate which specifically authorizes them to apply to a United States District Court for injunctive relief to stop any threat to air safety because of safety violations. This would have provided the due process constitutional protections afforded by the

Federal Rules of Civil Procedure, in particular Rule 65(b). The threat to shut down Mall Airways, without the agency have given public notice that were the FAA to issue an emergency order revoking an operating certificate the operator would be entitled to an immediate judicial hearing on whether there was a true "emergency," violated plaintiffs' right to due process.

ELEVENTH CAUSE OF ACTION

68. Although such a rule did exist with the Civil Aeronautics Administration, from which the original Federal Aviation Agency was transmogrified in 1958, the FAA Administrator has failed to promulgate a rule encompassing his emergency power, especially one which would contain as a guide for both agency officials and the public the standards and criteria by which the power is to be employed. In fact, however, the Administrator has established such criteria. His enforcement manual

provides:

> A. Emergency suspension or revocation of a certificate should be used only as an emergency safety measure and to provide immediate protection to the public. Therefore, emergency actions should be taken as soon as possible after the date of the incident. Moreover, the longer the interval between the date of the incident and the date of the action, the more difficult it will be for the FAA to establish that an emergency exists.
>
> B. An emergency suspension or revocation should never be used for punitive reasons. When receiving a recommendation for emergency action, legal counsel should ensure that there is sufficient evidence of an emergency requiring immediate effectiveness of an order of suspension or revocation . . .

To understate the matter by several magnitudes, the emergency power has a "substantial" impact on the public. The Administrator's failure to promulgate his rule with standards and criteria through the public notice and comment requirements of the Administrative Procedure Act denied plaintiffs their right, as an "interested persons," to participate in such rulemaking and official notice of those criteria. It

would also have provided a standard by which a United States District Judge could have determined the need for injunctive action, if any.

TWELFTH CAUSE OF ACTION

69. The threatened use of emergency power against the operating certificate of plaintiff Knipe's company Mall Airways, Inc. violated the FAA guidelines as set forth above. There was no rational basis to conclude there was any "immediate" threat to air safety or the public interest. Nor was there any rational basis for the charges levied against plaintiffs Knipe and Valentine. Even if the emergency had been legitimate on 10 November 1988, day and date on which defendant Koch wrote and delivered his letter threatening emergency enforcement action, the basis for such a claim was cured in the days following by training flight crews as demanded by Koch, yet the company was not allowed to return

to the air and the special inspection continued. These actions were the direct result of the wilful and wanton, negligent, malicious and reckless conduct of defendants Marinus "Rene" Koch, Stephen W. Smith, Martin J. Ingram, Robert E. Martin, George E. Murgitroyde, Marc Pandeloglou, Robert D. Murchland, Roy E. Johnsen, Charles G. O'Neill, Nicholas Sabatini, Thomas Accardi, Daniel J. Peterson, Edward Harahush, Loretta E. Alkalay and Gregory S. Walden.

THIRTEENTH CAUSE OF ACTION

70. Pursuant to the Federal Aviation Act of 1958, as amended, since all agency authority reposes in the Administrator (by delegation from the Secretary, Department of Transportation), he must specifically delegate to agency officials any part of such authority he chooses to have them exercise. Authority to issue emergency enforcement orders is delegated only to

assistant chief counsels for the various regions, and a few others. 14 CFR § 13.19. Defendant Marinus "Rene" Koch had absolutely no authority to either issue or threaten such orders and in so doing exceeded the duties and responsibilities assigned to him. His actions violated plaintiffs' right to be free of such threats.

FOURTEENTH CAUSE OF ACTION

71. In rare instances, revocation is based on an actual lack of qualifications, such as, demonstrated lack of skill as pilot or mechanic by failure to pass a flight or written test, or refusal to take such when there is a reasonable basis for such a request by FAA officials. By far, most revocations, especially of pilots and air-taxi operators, are based on the claim that the certificate holder has committed either one or two very serious safety violations, like flying under the

influence, or a series of alleged violations. In the case of an operator, these are usually turned up by an indepth inspection of company records and interviews of employees, past and present. Based on such a list of unproven charges, FAA officials assert that on their account the operator lacks the "care, judgment, and responsibility" required of a certificate holder, and that failure to maintain such a standard constitutes a lack of qualification to hold the certificate. On its face this is a "rule" within the meaning of the Administrative Procedure Act, sometimes referred to as the "Compliance Disposition" rule. As the linchpin justifying revocation, and use of the emergency power, it has a substantial impact on certificate holders. Although there once was an FAA project to draft and promulgate such a rule, it has never been lawfully promulgated. The Administrator's

failure to promulgate a compliance disposition rule through APA public notice and comment requirements, denied plaintiffs their right, as "interested persons," to participate in such rulemaking; failure to simply place the rule in the *Code of Federal Regulations* (CFR) violated their right to have official notice of fundamental agency policies. The use by defendants of the threat of emergency revocation had to have been and was based on a contention that Mall Airways, Inc. lacked such "care, judgment and responsibility."

FIFTHTEENTH CAUSE OF ACTION

72. The base inspection conducted 19, 20, 24, and 25 October 1988 by defendant FAA inspectors Marinus "Rene" Koch and Stephen W. Smith was clearly a setup for the abbreviated "special" inspection conducted two weeks later on 9 and 10 November 1988. Section 605 of the Federal

Aviation Act of 1958, 49 U.S.C. § 1425(b), specifically requires that inspectors "shall be charged with the duty . . . of advising and cooperating with each air carrier in the inspection and maintenance thereof . . ." Defendants Koch and Smith's failure and refusal to discuss with Mall Airways, Inc. management their concern and disagreement with emergency crew-training methods, or any other discrepancy, and give the company an opportunity to rectify any legitimate problem, and rebut or mitigate others, without shutting down the operation denied Mall Airways and plaintiffs their rights under this statutory command.

SIXTEENTH CAUSE OF ACTION

73. In accordance with FAR 135.13(b), any Part 135 commuter or on-demand air-taxi must have in its management officials who fill certain required slots, such as, director of operations, chief pilot, director of maintenance, even owners. These

may be filled only with personnel who are approved by FAA officials, although no related certificate or license is issued. As a result of the actions taken against Mall Airways, Inc. plaintiffs Knipe and Valentine were blacklisted by the FAA from holding any such positions. No timely charges were brought or hearing provided to determine their fitness to fill such a slot. This denied them due process of law and the blacklisting constituted a Bill of Attainder, in violation of the United States Constitution, *Article I, Section Nine*.

SEVENTEENTH CAUSE OF ACTION

74. It is strict FAA policy that the team leader for a special inspection of an air carrier come from an agency unit not connected with the FSDO which holds its operating certificate. Such inspections serve two purposes: 1) to ascertain regulatory compliance of the operator and

help it improve where necessary; 2) to evaluate and help improve the effectiveness of the local FSDO inspectors in their surveillance of operators. The purpose of keeping the team leader an outsider is to give objectivity to the inspection and avoid injecting any animosities or friction that might exist locally. Use of defendant Marinus "Rene" Koch as team leader for the 9 and 10 November 1988 inspection denied plaintiffs the benefit and protection of this policy.

CAUSES OF ACTION RELEVANT ONLY TO VALENTINE

EIGHTEENTH CAUSE OF ACTION

75. In the Order of Revocation, dated 18 January 1990, issued against plaintiff Glenn A. Valentine, it is charged that he had as Director of Operations "caused fraudulent entries to made in several pilot training records," and as a pilot "had flown four flights" when he had not met emergency recurrent training requirements.

These charges, in addition to those already alleged, violated plaintiff Valentine's right to due process at least five ways:

A. There was no rational basis for any of them;

B. Due to oversight on the part of the FAA, there is no regulation in Part 135 by which record entries required to be kept under that Part can be charged as having been fraudulently made, consequently, plaintiff Valentine was charged with a violation for which there is no lawful basis;

C. Any such recordkeeping requirements related only to plaintiff Valentine's duties as a Part 135 operator director of operations and had nothing to do with his exercising the privileges of his Air Transport Pilot rating; no lawful basis existed for using this charge as a basis for revoking his pilot's license;

D. FAA policy is that revocation may not

be used as "punishment" but only for lack of qualifications. The order against plaintiff Valentine failed to allege either that he lacked the care, judgment and responsibility required of a certificate holder, or even a general charge that he lacked the qualifications to hold it. Consequently, there was no lawful basis for the revocation of plaintiff Valentine's pilot certificate, which, obviously, was being used as a "penalty" in violation of agency policy.

E. Use of revocation was patently a ploy to get around the NTSB's "stale complaint" rule, 49 CFR § 821.33, which provides that the Board will not entertain an "offense" if it is more than six months old. The offenses charged against plaintiff Valentine were far more than six months old. Defendants action denied him benefit of that rule.

SIXTH AMENDMENT RIGHT TO JURY TRIAL

NINETEENTH CAUSE OF ACTION

76. The Supreme Court has long held that if the substance and nature of a civil offense, as well as the penalty imposed for it, are basically similar to that of a criminal violation, that fact, not a Congressional label calling it "civil," is the determinative factor as to whether a person is entitled to the protections of the Sixth Amendment. The safety-violation charges on which plaintiffs Knipe and Valentine were charged, are of such a nature that both plaintiffs Knipe and Valentine were entitled to a speedy and public trial by an impartial jury, as provided by the Sixth Amendment. Defendants, and each of them, through their acts or omissions denied both this Constitutional right.

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77. Defendants, and each of them, committed, or were responsible for the acts

and omissions complained of while acting under color of law. These acts and omissions were not within the scope of their authority, were not made in good faith, defendants had no reason to believe their conduct was lawful, and they were due to the negligent and careless disregard of the rights of plaintiff.

PUNITIVE DAMAGES

78. Those defendants separately named hereinafter, in committing the acts or omissions complained of engaged in a fraudulent conspiracy to conceal their lack of Congressional authority to impose license suspensions or revocations as a penalty for the violation of air-safety rules; and/or, in the alternative, in that connection acted maliciously or with wanton and reckless disregard of plaintiffs' constitutional rights; and by reason thereof, plaintiffs demand exemplary and punitive damages from each of them, jointly

and severally:

C. Dean McGrath Jr., Neil R. Eisner, Kenneth P. Quinn, Gregory S. Walden, Daniel D. Campbell, John M. Stuhldreher, John H. Cassady, Donald P. Byrne, Peter J. Lynch, Mardi R. Thompson, Karen R. Bury, Joseph A. Conte, Harry S. Gold, Loretta E. Alkalay, Randy E. Hyman, Brunhilda Sanders-Lane.

79. Those defendants separately named hereinafter, in committing the acts or omissions complained of engaged in a fraudulent conspiracy to force Mall Airways, Inc. to shut down and to concoct the charges levied against plaintiffs; and/or, in the alternative, acted maliciously or with wanton and reckless disregard of plaintiffs' constitutional rights; and by reason thereof, plaintiffs demand exemplary and punitive damages from each of them, jointly and severally:

Daniel J. Peterson, Thomas Accardi, Nicholas Sabatini, Marinus "Rene" Koch, Stephen W. Smith, Robert E. Martin, George E. Murgitroyde, Marc Pandeloglou, Robert E. Murchland.

INJURIES SUFFERED

80. By reason of the defendants' wrongful acts or omissions which deprived plaintiffs of their Constitutional rights, they have suffered:

PLAINTIFF RICHARD X. KNIPE

A. Economic loss:

i) Devaluation and virtual destruction of his company, Mall Airways, Inc.;

ii) Loss of income, past, present and future;

iii) Costs incurred in defending the enforcement actions against both Mall Airways and himself;

iv) Defamation of his reputation as pilot and manager of an air carrier which has and will harm his career in aviation reducing his future income therefrom;

B. Personal injury by way of mental distress.

PLAINTIFF GLENN A. VALENTINE

A. Economic loss:

i) Loss of income, past, present and future;

ii) Costs incurred in defending the enforcement action taken himself;

iii) Defamation of his reputation as pilot and manager of an air carrier which has and will harm his career in aviation reducing his future income therefrom;

B. Personal injury by way of mental distress.

RELIEF REQUESTED

WHEREFORE, plaintiffs pray for the following relief:

PLAINTIFF RICHARD X. KNIPE

I. For compensatory damages, the sum of Thirty Million Dollars ($30,000,000.00).

II. For personal injury by way of mental distress, the sum of Ten Million Dollars ($10,000,000.00).

III. For exemplary and punitive damages against the defendants named in Paragraphs 78 and 79, the sum of Ten Million Dollars

($10,000,000.00).

IV. For costs of suit and such attorney fees as are allowed by law.

V. For such other and further relief as the Court may deem just and equitable.

PLAINTIFF GLENN A. VALENTINE

I. For compensatory damages, the sum of Ten Million Dollars ($10,000,000.00).

II. For personal injury by way of mental distress, the sum of Five Million Dollars ($5,000,000.00).

III. For exemplary and punitive damages against the defendants named in Paragraphs 78 and 79, the sum of Ten Million Dollars ($10,000,000.00).

IV. For costs of suit and such attorney fees as are allowed by law.

V. For such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

_____

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Filed 10/27/92

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

No. 92-CV-1389

RICHARD X. KNIPE, GLENN A. VALENTINE,
and **BERNARD C. FORD,**

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL COMPLAINT UNDER THE
FEDERAL TORT CLAIMS ACT

Plaintiffs Richard X. Knipe, Glenn A. Valentine, and Bernard C. Ford complain and allege:

6. This action arises under the Federal Tort Claims Act, Sections 2671 through 2680 of Title 28 of the United States Code (28 U.S.C. §§ 2671-2680). This Court is vested with jurisdiction pursuant to Section 1346(b) of Title 28 of the United States Code (28 U.S.C. § 1346(b)).

7. Plaintiffs Richard X. Knipe and Glenn A. Valentine reside in Albany County, New York; plaintiff Bernard C. Ford, resides in Chenango County, New York. The acts and omissions complained of occurred in Albany County, New York, within the Northern District of the State of New York.

8. In 1971 plaintiff Richard X. Knipe started a small commuter airline called Mall Airways, Inc., operating between Albany and Binghamton, New York. Based in Albany, Knipe, an Air Transport Pilot (ATP) rated airman, utilized a six-place twin-engine Piper Aztec. He soon expanded to serve Elmira, New York. During the 1970s

the airline grew steadily, adding more aircraft and serving the New York City metropolitan area at Newark and La Guardia airports. Enjoying continued expansion and success, including serving Toronto and Montreal, Canada, by 1988 Mall Airways was utilizing seven 15-passenger Beech BE-99 and one 8-passenger Beech A-90 King-Air turbine-powered propeller aircraft. Plaintiff Knipe as of November 1988 owned eighty-seven and one-half percent (87-1/2%) of the outstanding shares in Mall Airways, Inc., the remainder belonging to a few other individuals having an association with the business. Mr. Knipe, always responsible for the overall operation of the air carrier, served in various management positions, as conditions required.

9. Plaintiff Glenn A. Valentine became associated with Mall Airways on an informal basis in the early 1970s, and with the growth of the company was offered a

fulltime management position in 1979. He accepted, leaving a management position in the trucking industry which he had held for many years. That position included substantial experience with the regulatory requirements of the Interstate Commerce Commission. By November 1988 he was serving in the key management and FAA approved position of director of operations of Mall Airways. Mr. Valentine also held an ATP.

10. Plaintiff Bernard C. Ford, an ATP with extensive pilot and managerial experience in scheduled commuter carriers, joined Mall Airways about 1986 as a line captain. He also holds an Aircraft and Powerplant mechanic's certificate (A&P). Because of his extensive commuter experience, he was given additional duties as director of marketing, with the primary function of coordinating customs and immigration matters with Canadian authorities at Toronto and Montreal; and

training company pilots in how to handle Canadian paperwork and deal with those personnel. That position did not require FAA approval, as would director of operations, chief pilot, and so forth.

11. Through most of its existence, and in 1988, Mall Airways' main base was at Albany County Airport, Albany, New York. Company headquarters were located in offices less than 200 feet across a parking lot from the Federal Aviation Administration's Flight Standards District Office. In October-November 1988 Mall Airways was in sound financial condition.

12. Scheduled carriers such as Mall Airways, which utilize small aircraft (19 passenger seats or less), are issued a certificate (license) to operate under Part 135 (14 CFR pt 135) of the Federal Aviation Regulations (FARs). Each certificate is assigned to a specific FAA field office, generally a Flight Standards District

Office (FSDO, or "fizz-doe"). From that office the operator is assigned a Principal Operations Inspector (POI), Principal Maintenance Inspector (PMI) and Principal Avionics Inspector ("PAI") who, as their titles indicate, are responsible for monitoring various areas of a carrier's operations. The POI is concerned with the qualifications, training and utilization of flight crews, pilots and flight attendants, as well as required recordkeeping; and the conduct and proficiency of any company check-airman authorized to perform certain periodic flight checks of company pilots on behalf of the Administrator. All operators are required to create and maintain FAA approved manuals for various operational phases, training, overall company operations, operation of specific aircraft, and so forth. Same is true of maintenance (airframe and engines), and avionics (radios and other electronic devices).

13. In August 1988, Albany FSDO Operations Unit Manager Roy E. Johnsen advised Mall Airways by letter that he had assigned a new POI to the company, inspector Stephen W. Smith, one of several who had been so assigned during the previous year. Plaintiff Glenn A. Valentine, now director of operations, immediately, and repeatedly, invited Smith to spend a day with Mall reviewing its operations. Smith declined, nor did he once come to the facility for a look-around--until much later. For some time up to early 1988 one James Allan had been POI. In January 1988 Johnsen, while serving as POI supervisor, was made temporary POI of Mall Airways. Assigned to assist him in his duties was inspector Marinus "Rene" Koch. Koch effectively served as the real POI until the appointment of Smith in August.

14. In October 1988 Smith called Valentine and advised him that he would be

coming to the facility in a few days to make a "base" inspection. He did, and brought Koch with him. Although base inspections are usually routine in the course of POI and PMI duties, Smith and Koch's conduct indicated this one was more than routine and that in fact Koch was the leader. Both Smith and Koch throughout the inspection displayed an antagonistic attitude. Previous relations with Koch had for some time been strained. This was because of his continuing insistence that certain emergency training procedures, although approved by earlier POIs and their supervisors, and enscribed in the FAA approved company training manual, did not comply with FAA regulations. The inspection occurred on or about October 19, 20, 24 and 25. During that time Smith and Koch, although so requested, and required by law to do so, engaged in almost no communication with Mall Airways management

about anything that might have been out of order. Nor was there any communication after the inspection about any possible discrepancies found, so they could be discussed and, if need be, corrected.

15. Just two weeks later, on or about 8 November 1988, Knipe was advised that Mall Airways would be the subject of a "special" inspection beginning the next day. Confined in bed due to a bad back and leg, director of operations Valentine managed to get to the airport that next day, 9 November. It is strict agency policy that special inspection teams are to be composed mainly of inspectors from other FAA offices not directly familiar with or responsible for the operator and, at the least, led by an inspector not of that particular FSDO. The team's purpose is to conduct an indepth audit to help upgrade both operator compliance--most often regarding recordkeeping--and especially to improve

the principal inspectors' surveillance techniques and understanding of the multiplicity of rules governing any commercial operation. Designated to coordinate the team efforts and dispatched from Eastern Region headquarters in Jamaica, New York (adjacent to JFK Int'l Airport) was inspector Martin J. Ingram. On arrival he announced he'd only be there that day and that the team leader for the inspection would be Koch who was, of course, from to the Albany FSDO. Koch was accompanied by inspectors Stephen W. Smith and George E. Murgitroyde, both from the same FSDO, and an inspector Robert Murchland from elsewhere in the FAA Eastern Region.

16. Plaintiffs Knipe and Valentine asked Ingram to stay for the entire inspection, pointing out that from prior experience with Koch he could not be objective about the company, especially as he had essentially served as company POI. Ingram

promised that he would, but then reneged and left early the next day, 10 November. About 3:00 p.m. that same afternoon (the inspection obviously having just started the day before), Koch left the premises, saying he'd "be back in about an hour." He returned sometime after 4:30 p.m., accompanied by Smith and Murchland. He carried with him a letter, on official FAA letterhead, signed by him and obviously prepared earlier but dated that day, that complained that some twenty-three (23) Mall Airways pilots had not been properly trained in various emergency procedures--as determined by him. Although Koch had known about the company's procedures since at least early spring of that year, and specifically from the base inspection of two weeks earlier, he gave the company just *one hour* to produce records confirming that appropriate emergency training had been completed; and also forbade use of any

pilot who had not been so trained. If these commands were not complied with, his letter continued, he threatened that "the FAA will take enforcement action, including possible emergency action." This threat effectively shut down the airline. And it was kept shut down for weeks thereafter, even though the training as defined by Koch was immediately performed.

17. Mall Airways president and owner Richard Knipe, within hours of Koch's threat, called back all aircraft and crews to home base and, rather than argue with Koch, immediately began the retraining which Koch insisted was the problem. This mostly involved hands-on training of emergency evacuation procedures, like pulling the emergency window out, firing off a fire extinguisher, and so forth. The company procedures Koch was complaining about had been in use for *six* years. They included, for evacuation training of crews,

the use of a training video. That video was produced in late 1982. Company personnel, as well as an *FAA inspector* and the Chief of the Albany County Airport Crash, Fire and Rescue Team, were the actors. It had been used continually and openly starting with 1983. It had been specifically approved by FAA officials and was contained in the company training manual. Koch's threat of emergency action was based on his disagreement with these procedures, and was clearly the reason he made no comment about them during the October base inspection and fomented the special inspection which followed. As late as spring 1988, during company training sessions, this video method was used and again specifically approved by unit manager Roy Johnsen, Koch and Smith's superior. Koch was privy to this and, in fact, had attended those very same 1988 spring training sessions and had made his disagreement known then, or not

long thereafter. Koch was claiming they did not comply with the requirements of 14 CFR 135.331(c), which would appear to require hands-on training. But he ignored the escape clause, "unless the Administrator finds that, for a particular drill, the crewmember can be adequately trained by demonstration." This is what previous FSDO officials had relied upon in approving certain training by demonstration in a carefully acted video.

18. Rene Koch's October base and November special inspections of Mall Airways set in motion a course of FAA enforcement action against Mall Airways, plaintiffs Richard Knipe, Glenn Valentine, Bernard Ford, and at least one other company official. What Koch did, with the acquiesence or participation of his superiors, led to the destruction of Mall Airways: not long after it was allowed to return to service, the corporation, with its principal asset, its

Canadian certificates authorizing it to serve Toronto and Montreal, was sold to another carrier. It led to action against Knipe instituted under the Civil Penalty Demonstration Program; revocation of Valentine's ATP; 120-day suspension of Ford's ATP. Both certificate actions were automatically stayed by 49 U.S.C. § 1429(a).

19. Shortly after the November shutdown both Valentine and Ford were forced out of their jobs at Mall by the FAA and black-listed, which prevented them from obtaining similar employment in the aviation industry for which they were eminently qualified. In the consent order described below, Valentine was identified by his job (director of operations), and Ford, by name. That consent order told the company that neither could continue in their management positions, and as a result, as a means of placating FAA officials they were

fired by Mall, even though both were qualified as line pilots.

20. Even though Knipe had shut down operations and almost immediately brought all planes and crews home, and trained them according to Koch's mandates, the company was not thereafter allowed to resume operation: the special inspection was continued for many weeks thereafter. No previous indication had been given to justify that continuance other than Koch's complaints. By the time Mall was allowed to start up again, the damage had been done. After Koch had accomplished his purpose in the first two or three days, the special inspection team was headed by inspectors Marc Pandeloglou and Edward Harahush, whom came from elsewhere in the Eastern Region. Accepting Koch's contentions without scrutiny, Loretta E. Alkalay, Assistant Chief Counsel for the FAA Eastern Region, Daniel J. Peterson, Regional Director, Thomas

Accardi, Manager, Flight Standards Division, and Nicholas Sabatini, his assistant manager, continued with the threat of using an emergency order of revocation and forced the company to sign a consent order as the only way to avoid formal legal action (which would have removed all chance of survival and immediately destroyed it), and by which it agreed to remain shut down until allowed to return to operation by these same FAA officials.

21. More than two months later, Mall Airways resumed operation, shortly after which, as indicated, it was sold. One year later, on 18 January 1990, continuing the course of action initiated against the company, Ms. Alkalay issued the certificate orders that revoked Valentine's ATP and suspended Ford's. On 6 November 1990, now two years after the Koch special inspection, she filed a complaint against

Knipe in the agency's new Civil Penalty Demonstration Program (CPDP), seeking civil-money fines.

22. The CPDP charges against Knipe were dismissed by a DOT-FAA Administrative Law Judge (ALJ) 20 March 1991, because Alkalay had not properly served the complaint. She initiated an appeal of this decision, but the FAA Office of Chief Counsel in Washington, D.C., withdrew it on 24 May 1991, ending that case. The enforcement actions she initiated against Valentine and Ford, and one other Mall Airways official, went to hearing before an NTSB ALJ. They were prosecuted by FAA lawyers Randy E. Hyman and Brunhilda Sanders-Lane. The ALJ, before trial, dismissed a number of charges in both cases as "stale," that is, not prosecuted within the six-month time requirement of the NTSB (a self-imposed statute of limitations). This totally disposed of Ford's case; after two days of

trial, she dismissed the other charges against Valentine and the other official as lacking merit. Alkalay appealed Valentine's case to the full five-member NTSB Board, where it remains pending more than two years later.

23. At times relevant herein Samuel K. Skinner, former Secretary, Department of Transportation (DOT), had overall responsibility for the various DOT modalities, including the Federal Aviation Administration (FAA); James B. Busey IV, former FAA Administrator, was directly responsible by law and by delegation of authority from Secretary Skinner, for all agency actions.

24. At times relevant herein, the following officials, and others unknown, were responsible for supervising, implementing and conducting the FAA's regulatory enforcement program at both DOT and FAA headquarters in Washington, D.C.: C. Dean McGrath, Jr., Acting DOT General

Counsel; Neil R. Eisner, DOT Assistant General Counsel for Regulations and Enforcement; Kenneth P. Quinn, FAA Chief Counsel; Gregory S. Walden, former FAA Chief Counsel; John H. Cassady, FAA Deputy Chief Counsel; Donald P. Byrne, FAA Assistant Chief Counsel for Regulations and Enforcement; Peter J. Lynch, FAA lawyer and head of the FAA Chief Counsel Office Enforcement Proceedings Branch; Mardi R. Thompson, FAA lawyer and head of the FAA Chief Counsel Office Enforcement Policy Branch; Karen R. Bury, formerly an FAA staff lawyer; Joseph A. Conte, FAA staff lawyer; Harry S. Gold, FAA staff lawyer.

25. At times relevant herein, the following were directly responsible for either the initiation, supervision or conduct of the various enforcement actions taken against plaintiffs and Mall Airways, Inc. from and after November 1988: Loretta E. Alkalay, Assistant Chief Counsel, FAA

Eastern Region; Daniel J. Peterson, Director, FAA Eastern Region; Thomas Accardi, formerly Manager, Flight Standards Division, Eastern Region; his assistant manager, Nicholas Sabatini; Randy E. Hyman and Brunhilda Sanders-Lane, staff lawyers, FAA Eastern Region; and former FAA chief counsel Gregory S. Walden.

26. At times relevant herein, the following officials had overall responsibility for the legal affairs of the National Transportation Safety Board and its handling of FAA certificate actions appealed to the Board: Daniel D. Campbell, NTSB General Counsel; John M. Stuhldreher, retired NTSB General Counsel.

27. At times relevant herein, the following FAA officials had overall responsibility for the initiation, conduct, and handling of the base and special inspections of Mall Airways during October 1988 to January 1989, and for recommending

the threatened and actual enforcement actions taken in connection therewith against the airline and plaintiffs: Daniel J. Peterson; Thomas Accardi; Nicholas Sabatini; Martin J. Ingram; Charles O'Neill and Roy E. Johnsen.

28. At times relevant to the claims made herein, the following FAA inspectors and officials, were responsible for and directly involved in the initiation and conduct of the base inspection and continuing special inspection of Mall Airways during October 1988 to January 1989, and made recommendations to superiors and agency legal counsel which led to the enforcement actions initiated against Mall Airways, Inc., and plaintiffs Knipe, Valentine and Ford: Stephen W. Smith; Martin J. Ingram; Marinus "Rene" Koch; Roy E. Johnsen; Robert Martin; George Murgitroyde; Marc Pandeloglou; Robert D. Murchland; Edward Harahush.

29. FAA officials, after investigation and a determination has been made to initiate enforcement action against a suspected violator, unless only low-level administrative action is taken (such as, warning letters, letters of correction), choose between initiating civil penalty action or punitive certificate action. This choice is made even before the alleged violator is given notice that he is being charged. The former, with the recent exception of the Civil Penalty Demonstration Program, carries with it the right to "demand" jury trial, with the only possible penalty a money fine; the latter affords trial in a one-man administrative hearing with right of appeal to the full five-member National Transportation Safety Board; the only possible penalty is license suspension or revocation. The United States District Judge has no authority to change the money-fine to a license suspension, no

matter how heinous the offense; the Board cannot change suspension or revocation to a money fine, no matter how severe and disproportionate the impact might be, for instance, on a professional pilot who could lose months of wages, indeed, his job, or an entire business shut down. Ironically, an unlicensed person, who commits the same violation, because there is no certificate to proceed against, at all times relevant herein, was guaranteed his right to be tried in United States District Court with the right to "demand" trial by jury of any fact, as has been provided in law since 1926, and, at the least, pay only a money fine.

30. The FAA Administrator, through subordinates, pursuant to the Federal Aviation Act of 1958, as amended (FA Act), sections 609 and 1005(a), 49 U.S.C. §§ 1429(a) & 1485(a), oftimes declares that an emergency exists requiring the immediate

effectiveness of a suspension or revocation order (usually revocation). Revocations for a true lack of qualifications occur for medical reasons or, infrequently, when a pilot has had an accident and then refuses to take, or flunks, a flight test. Almost always, emergency revocations are based either on the perceived seriousness of a single violation, like flying under the influence or, in the case of an operator, on a series of alleged violations which usually have occurred over a period of time but are discovered in a narrow time-frame during inspection of company records. Although some are often one, two or three years old, these are lumped together in a single order and revocation justified because the violations demonstrate that the pilot, mechanic or operator lacks the "care, judgment, and responsibility" required by the FAA of any certificate holder. In other words, maintaining such a

standard is a qualification of holding the certificate and a "rule" of the agency. Within both FAA and NTSB it is also known as the "Compliance Disposition" rule. The emergency power is used on grounds the continued exercise of the privileges of the particular certificate by its holder constitutes an immediate threat to air safety and the public.

31. At the above mentioned times and places, and at others unknown, defendant, through its agents, servants and employees, was negligent in the training and supervision of the officials specifically named herein, and others unknown. This negligence allowed DOT, FAA, and NTSB officials to negligently implement and apply to plaintiffs and Mall Airways, or neglect to follow: (1) DOT-FAA standards, rules and policies; (2) provisions of the FA Act; (3) laws governing authority of the NTSB over FAA certificate orders; (4) the

Administrative Procedure Act; (4) Constitution of the United States. All of the negligence asserted herein occurred during and within the conduct of the business of the United States government and within the course and/or scope of employment of its agents, servants and employees. Such negligence was the proximate cause of the events and damages which occurred to Mall Airways and plaintiffs Richard X. Knipe, Glenn A. Valentine and Bernard C. Ford, which were as follows:

(a) The base inspection conducted 19, 20, 24, and 25 October 1988 by FAA inspectors Koch and Smith was plainly a fraudulent setup for the abbreviated "special" inspection conducted two weeks later on 9 and 10 November 1988. FA Act section 605(b), 49 U.S.C. § 1425(b), specifically requires that inspectors "shall be charged with the duty of advising

and cooperating with each air carrier in the inspection and maintenance thereof." Koch and Smith's failure and refusal to discuss with Mall Airways' management their concern and disagreement with emergency crew-training methods, or any other of the discrepancies later charged in the enforcement actions, and give the company an opportunity to rectify any legitimate problem, or rebut or mitigate others, without shutting down the operation, denied Mall Airways and plaintiffs their rights under this statutory command and led to the events which occurred thereafter. Continuance of the special inspection under threat of emergency action by Eastern Region officials after plaintiff Knipe had called in all his pilots and trained them as inspector Koch had demanded, was a putup job; it had no rational basis other than as an attempt to coverup and justify Koch's illegal action. Koch and Smith, and the

supervisory officials whose careless, reckless and negligent conduct let them get away with it, in shirking their duty under section 605 to Mall Airways and plaintiffs, were also violating the public trust: if the Mall aircrews were so unsafe that threat of emergency enforcement action to shut down the air carrier was required during the special inspection to force them to rectify the asserted training problem, then Koch and company let the public remain at risk for the two weeks following the base inspection.

(b) Pursuant to FA Act section 303(d), 49 U.S.C. § 1344(d), since all agency authority reposes in the Administrator (by delegation from the DOT Secretary), in order for his subordinates to act in his name, he must specifically and formally delegate to FAA officials whatever part of his authority he chooses to have them exercise. Authority to issue emergency

enforcement orders is delegated only to assistant chief counsels for the various administrative regions, and a few others, in 14 CFR § 13.19. Inspector Koch had absolutely no authority to threaten such orders and in so doing exceeded the duties and responsibilities assigned to him. His actions violated plaintiffs' right to be free of such threats. This occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the Federal Aviation Act of 1958 and the rules and policies of the FAA.

(c) The threatened use of emergency power against the operating certificate of plaintiff Knipe's company Mall Airways, Inc., violated the FAA guidelines on use of the emergency power. The agency enforcement manual provides:

> A. Emergency suspension or revocation of a certificate should be used only as

> an emergency safety measure and to provide immediate protection to the public. Therefore, emergency actions should be taken as soon as possible after the date of the incident. Moreover, the longer the interval between the date of the incident and the date of the action, the more difficult it will be for the FAA to establish that an emergency exists.
>
> B. An emergency suspension or revocation should never be used for punitive reasons. When receiving a recommendation for emergency action, legal counsel should ensure that there is sufficient evidence of an emergency requiring immediate effectiveness of an order of suspension or revocation . . .

There was no rational basis to conclude there was any "immediate" threat to air safety or the public interest. Even if emergency action would have been legitimate on 10 November 1988, day and date on which Koch wrote and delivered his letter threatening it, the basis for such a claim was cured in the two or three days that followed by Mall Airways training its flight crews as demanded by Koch. Yet for no legitimate reason the company thereafter was not allowed to return to the air and

the special inspection was continued. These acts and events violated Mall's and plaintiffs' right to have the FAA follow its own rules and policies. This occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the Federal Aviation Act of 1958 and the rules and policies of the FAA.

(d) The *continuance* of the "special" inspection under threat of emergency revocation, even after Mall's aircrews had received the very training that Koch insisted they had to have, violated the emergency guidelines set forth in the preceding paragraph, and constituted a further violation of the section 605 mandate that inspectors advise and cooperate in the maintenance and inspection of air carriers. At the time Assistant Chief Counsel Loretta Alkalay took over the

affair initiated by Koch and others (if she was not in fact involved from the start), there was no finding, much less, a legitimate one, that either the flight crews or aircraft of Mall Airways were in violation of any safety regulation that rendered them unsafe for use in public carriage. In fact, continuance of the "special" inspection, after Knipe had literally shut down the airline because of Koch's threats and cured the asserted problems, was solely designed to give Koch's actions the appearance of legitimacy. Continuation of the inspection without allowing Mall Airways to resume operations immediately violated the airline's and plaintiffs' right to have the FAA follow its own rules and policies. This occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the Federal

Aviation Act of 1958 and the rules and policies of the FAA.

(e) It is strict FAA policy that the team leader for a special inspection of an air carrier come from an agency unit not connected with the FSDO that holds its operating certificate. Such inspections serve two purposes: 1) to ascertain regulatory compliance of the operator and help it improve where necessary; 2) to evaluate and help improve the effectiveness of the local FSDO inspectors, who the primary and continuing responsibility, in their surveillance of their assigned operators. The purpose of keeping the team leader an outsider is to give objectivity to the inspection and avoid injecting into it any animosities or friction that might exist locally. Use of inspector Koch as team leader on 9 and 10 November 1988 to initiate the so-called "special" inspection and threaten emergency action violated Mall

Airway's and plaintiffs' right to have the FAA follow its own rules and policies. This occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the rules and policies of the FAA.

(f) In accordance with 14 CFR § 135.13(b), any Part 135 commuter or on-demand air-taxi must have in its management officials who fill certain required slots, such as, director of operations, chief pilot, director of maintenance, even owners. These may be filled only with personnel who are approved by FAA officials, although no related certificate or license is issued. As a result of the actions taken against Mall Airways, Inc., plaintiffs Knipe, Valentine and Ford were blacklisted by the FAA from holding any such positions. As noted above, Valentine was identified in the Loretta Alkalay

consent order by job title (director of operations), and Ford by name, although he held no management position that required FAA approval. No timely charges were brought or hearing provided to determine their fitness to fill such a slot prior to forcing Mall Airways to sign the consent order, which led to both being fired altogther, although both were line pilots and eligible for that duty. This denied them due process of law; the blacklisting constituted a Bill of Attainder, in violation of the United States Constitution, *Article I, Section Nine*. This occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the rules and policies of the FAA, the Federal Aviation Act of 1958, and the U.S. Constitution.

32. In the Order of Revocation issued against plaintiff Glenn A. Valentine's ATP

certificate, it is charged that he had as Director of Operations "caused fraudulent entries to be made in several pilot training records," and as a pilot "had flown four flights" when he had not met emergency recurrent training requirements:

(a) There was no rational basis for any of these charges; and they were made in a further and belated effort by FAA officials to legitimize destruction of Mall Airways;

(b) Due to oversight on the part of the FAA, there is no regulation in Part 135 by which record entries required to be kept under that Part can be charged as having been fraudulently made (although such rules exist in other FAR parts), consequently, plaintiff Valentine was charged with regulatory violations for which there was no lawful basis;

(c) Any such recordkeeping requirements related only to plaintiff Valentine's duties as a Part 135 commuter director of

operations and had nothing to do with his exercising the privileges of his Air Transport Pilot rating and air safety; no lawful basis existed for using this charge as a basis for revoking his pilot's license;

(d) FAA policy is that revocation may not be used as "punishment" but only for lack of qualifications. The order against plaintiff Valentine failed to allege either that he lacked the care, judgment and responsibility required of a certificate holder, or even a general charge that he lacked the qualifications to hold it. Consequently, even under the non-published, non-promulgated policies and rules of the FAA, there was no lawful basis for the revocation of plaintiff Valentine's pilot certificate which, in violation of agency policy, obviously was being used as a "penalty."

(e) Use of revocation was patently a

ploy to get around the NTSB's "stale complaint" rule, 49 CFR § 821.33, which provides that the Board will not entertain an "offense" if it is more than six months old, unless qualifications are at issue. The offenses charged against plaintiff Valentine were far more than six months old and had no rational relationship to his ability to fly an airplane. FAA officials' fraudulent use of revocation action denied him benefit of that rule.

(f) The Administrator has no authority to order the suspension or revocation of an airman's--or any other--certificate as a penalty for the violation of a safety rule, when in fact, in violation of the Constitution, certificate penalties were created by the executive branch of government, not the legislative; nor does the NTSB have authority to try such cases. Use of a certificate action denied Valentine his statutory right under FA Act

section 901, 49 U.S.C. § 1471, which provides that "Any person who violates any rule, regulation or order shall be subject to a civil penalty." It further denied him his right to jury trial called for by section 903, 49 U.S.C. §1473, which provides that "any offense" be tried in federal district court with the right to "demand" trial by jury of any fact.

(g) Because the FAA has no rule that warns the public it claims the authority to suspend licenses as a penalty, Valentine was denied the right to have notice of that;

(h) It is an unassailable fact that FAA and its predecessor agencies in the executive branch of the government created certificate penalties as an alternative penalty to civil money fines--which are plainly authorized by law. It is unconstitutional for any branch of government, except Congress, to create

penalties or benefits. This principle is enscribed in the Administrative Procedure Act, 5 U.S.C. § 558. Initiation of a certificate action against Valentine denied him protection of the Constitution and the APA.

(i) All the above occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the rules and policies of the FAA, Federal Aviation Act of 1958, Administrative Procedure Act, and U.S. Constitution.

33. The 18 January 1990 order issued by Loretta Alkalay against plaintiff Bernard C. Ford, which suspended his ATP certificate for 120 days, violated his right to due process in the following ways:

(a) There was no rational or lawful basis for the charges, which centered on the alleged lack of proper emergency

training--thus, if true, making it unlawful for him to act as pilot-in-commond of the flights contended to be in violation of the FARs.

(b) The violation charges were initiated so late as to violate the NTSB's "stale complaint" rule, 49 CFR § 821.33. It provides that the Board will not entertain an "offense" if it is more than six months old before the FAA notifies the airman of the proposed charges, unless qualifications are involved. This violated Ford's right to have the protection of that rule.

(c) The Administrator has no authority to order the suspension of an airman's--or any other--certificate as a penalty for the violation of a safety rule, nor does the NTSB have authority to try such cases. Use of a certificate action denied Ford his statutory right to pay a money fine under FA Act section 901, 49 U.S.C. § 1471, which provides that "Any person who violates any

rule, regulation or order shall be subject to a civil penalty." It further denied him his right to jury trial called for by section 903, 49 U.S.C. §1473, which provides that "any offense" be tried in federal district court with the right to "demand" trial by jury of any fact.

(d) Because the FAA has no rule that warns the public it claims the authority to suspend licenses as a penalty, Ford was denied the right to have notice of that;

(e) It is an unassailable fact that the FAA and predecessor agencies in the executive branch of the government created certificate penalties as an alternative penalty to civil money fines, which are plainly authorized by law. It is unconstitutional for any branch of government, except Congress, to create penalties or benefits (i.e., foodstamps). This constitutional principle is enscribed in the Administrative Procedure Act, 5

U.S.C. § 558. Initiation of a certificate action against Ford denied him the protection of the Constitution and the APA.

(f) All the above occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the rules and policies of the FAA, Federal Aviation Act of 1958, Administrative Procedure Act, and U.S. Constitution.

34. On 6 November 1990, Loretta Alkalay filed a complaint against plaintiff Knipe in the agency's new Civil Penalty Demonstration Program (CPDP), seeking civil-money fines. The charges originated from the special inspection. Filing this complaint violated Knipe's rights in the following ways:

(a) There was no rational or lawful basis for the charges, which centered on the alleged lack of proper emergency

training--and which, if true, would have made it unlawful for him to act as pilot-in-command of the flights charged.

(b) The new civil penalty demonstration program was not lawfully constituted at the time of the alleged infractions. Knipe was entitled to have the charges brought under FA Act sections 901 and 903. Thus he was denied his right to try to effect a compromise settlement and pay a money fine, to have an independent United States Attorney review and prosecute the case, and his right to trial in federal district court with its concommitant right to demand trial by jury. Had FAA officials been faced with the scrutiny of the case which a U.S. Attorney would have provided, it is virtually certain they would not have instituted it; but the CPDP was a quick an easy way to do that, a forum which they controlled.

(c) All the above occurred as the proxi-

mate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the rules and policies of the FAA, Federal Aviation Act of 1958, Administrative Procedure Act, and U.S. Constitution.

35. The events and actions described above and below would not have happened *but for* the following: negligent supervision and training by Secretaries of Transportation, Administrators of the Federal Aviation Administration, and their general and chief counsels, and other officials, of those DOT, FAA and NTSB employees engaged in rulemaking and regulatory enforcement activities. Nor would they have happened *but for* the negligent and reckless application of the Federal Aviation Act, the laws authorizing NTSB review of FAA certificate orders, the Administrative Procedure Act, United States

Constitution, and FAA rules and policies. The particular events, actions, and matters relevant to the actions taken against Mall Airways and plaintiffs, including the threat of emergency revocation of the airline's operating certificate, are as follows:

36. It is a fundamental Constitutional requirement that any person, before the government deprive him of life, liberty or property, be given adequate notice to prepare for, and the right to participate in, a prompt hearing; or, if action must be taken on an immediate basis, such as, might occur with a judicial Temporary Restraining Order (TRO), a hearing be held quickly as possible, ten days being the usual measure of time--but in actuality, much shorter, at least on an informal basis with counsel present before the judge. The emergency power granted the Administrator in FA Act sections 609(a) and 1005(a), 49 U.S.C. §§

1429(a) & 1485(a), is unconstitutional on its face: it is tantamount to an executive-branch TRO but provides for no hearing either before or immediately after the issuance of an emergency order of suspension or revocation, the purpose of which would be to determine whether or not a true emergency exists, or whether FAA officials are abusing the power by using it as punishment, a use contrary to agency policy. DOT-FAA officials are well aware that the NTSB takes the position it has no authority to determine if a true emergency exists, or to do anything about it if they found that it did not. Yet FAA officials have full authority to provide such a hearing, but choose not to use it. Pursuant to the FA Act, section 1007, 49 U.S.C. § 1487, FAA officials have a Congressional mandate which specifically authorizes them to apply to a United States District Court for injunctive relief to stop any threat to

air safety because of safety violations. This would have provided the due process constitutional protections afforded by the Federal Rules of Civil Procedure, in particular Rule 65(b). The threat to shut down Mall Airways, without the agency having been given public notice that were the FAA to issue an emergency order revoking an operating certificate the operator would be entitled to an immediate judicial hearing on whether there was a true "emergency," violated plaintiffs' right to due process. This occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the rules and policies of the FAA, Federal Aviation Act of 1958, Administrative Procedure Act, and U.S. Constitution.

37. Although such a rule did exist with the Civil Aeronautics Administration, from

which the original Federal Aviation Agency was transmogrified in 1958, the FAA Administrator has failed to promulgate a rule encompassing his emergency power, especially one which would contain as a guide for both agency officials and the public the standards and criteria by which the power is to be employed. In fact, however, the Administrator has established such criteria, which are set forth above in ¶ 26(c). To understate the matter by several magnitudes, the emergency power has a "substantial" impact on the public. The Administrator's failure to promulgate his rule with standards and criteria through the public notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553, denied plaintiffs their right, as an "interested persons," to participate in such rulemaking and be given official notice of those criteria. It would also have provided a standard by which a

United States District Judge could have determined the need for injunctive action, if any. This occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the rules and policies of the FAA, Federal Aviation Act of 1958, Administrative Procedure Act, and U.S. Constitution.

38. In some instances, revocation is based on an actual lack of qualifications, such as, demonstrated lack of skill as pilot or mechanic by failure to pass a flight or written test, or refusal to take such when there is a reasonable basis for such a request by FAA officials. By far, most revocations, especially of pilots and air-taxi operators, are based on the claim that the certificate holder has committed either one or two very serious safety violations, like flying under the

influence, or a series of alleged violations. In the case of an operator, these are usually turned up by an indepth inspection of company records and interviews of employees, past and present. Based on such a list of unproven charges, FAA officials assert that on their account the operator lacks the "care, judgment, and responsibility" required of a certificate holder, and that failure to maintain such a standard constitutes a lack of qualification to hold the certificate. On its face this is a "rule" within the meaning of the Administrative Procedure Act, sometimes referred to as the "Compliance Disposition" rule. As the linchpin justifying revocation, and use of the emergency power, it has a substantial impact on certificate holders. Although there once was an FAA project to draft and promulgate such a rule, it has never been lawfully promulgated. The Administrator's

failure to promulgate a compliance disposition rule through APA public notice and comment requirements, 5 U.S.C. § 553, denied plaintiffs their right, as "interested persons," to participate in such rulemaking; failure to simply place the rule in the *Code of Federal Regulations* (CFR), formally promulgated or not, violated their right to have official notice of fundamental agency policies. The threat of emergency revocation of Mall Airways' operating certificate by inspector Koch, followed by the similar threat of Assistant Chief Counsel Loretta Alkalay, was based on a contention that Mall Airways, Inc. lacked such "care, judgment and responsibility" because of the fraudulent claims of violations regarding emergency training procedures. The above occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees

in interpreting and applying the rules and policies of the FAA, Federal Aviation Act of 1958, Administrative Procedure Act, and U.S. Constitution.

39. The suspension or revocation of pilot, mechanic or operating certificate by the FAA, threatened or actual, as a penalty or sanction for the violation of one or more FARs has never been authorized by law, but was created by the executive branch. Only Congress may constitutionally create penalties, sanctions, or benefits, that is, it may not delegate its *Article I, Section I*, legislative authority to any other branch of the government. This constitutional principle is codified in the Administrative Procedure Act, 5 U.S.C. § 558. The use of certificate suspensions and revocations as penalties is now and always has been, since the federal government first initiated regulation of aviation through the Air Commerce Act of 1926, a

creation of the executive branch, not Congress. FAA threat of the imposition of such penalties on Mall Airways and the actual imposition of same on plaintiffs Valentine and Ford violated this constitutional principle. This occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the rules and policies of the FAA, Federal Aviation Act of 1958, Administrative Procedure Act, and U.S. Constitution.

40. The trial of air-safety violations before the National Transportation Safety Board has never been authorized by law. The only forum ever authorized by law, in 1926, seminal year of federal regulation of aviation, and continuing to the present, was United States District Court. (The exception to this of the Civil Penalty Demonstration Program, is noted, but not

relevant, and in any case the penalty remains a money fine.) The FAA had no lawful right to threaten Mall Airways with the trial of its alleged safety violations before the NTSB, or to actually prosecute the charges against plaintiffs Valentine and Ford in that forum. This occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the rules and policies of the FAA, Federal Aviation Act of 1958, Administrative Procedure Act, and U.S. Constitution.

41. The only form of penalty ever authorized by Congress for violations of air-safety rules is the civil-money fine. FAA threat and use of punitive certificate action procedures denied plaintiff Knipe and his company, Mall Airways, Inc., and plaintiffs Valentine and Ford, their statutory right to pay such a money fine

for any violations of which they were found guilty, or agreed to compromise. The FAA had the authority, should it have determined that any crewmember was unqualified, or aircraft unairworthy, to have suspended the relevant certificate until it was demonstrated that the person or aircraft was in compliance with specific, detailed qualifications regulations. Common sense, of course, as demonstrated by section 605's mandate to advise and cooperate, would dictate telling the operator and/or pilot of any problem and giving them an opportunity to resolve it informally--just as plaintiff Knipe did by bringing in his pilots and giving them the very training inspector Koch complained they lacked. This occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the rules and policies of the FAA,

Federal Aviation Act of 1958, Administrative Procedure Act, and U.S. Constitution.

42. The Federal Aviation Administration has never promulgated a general rule that warns pilot, mechanic or operator that his license is at risk for the violation of any safety rule; nor a rule which advises that the Administrator claims the power to decide in his absolute discretion to have such charges tried administratively before the NTSB, incurring suspension or revocation as an alternative penalty to a civil-money fine, rather than in United States District Court or, later, in the CPDP program. Agency failure to put such a rule in the Federal Aviation Regulations and cause it to be published in the *Code of Federal Regulations* denied plaintiffs the right to have notice of such an important and critical agency policy which can so drastically affect the property right that

an FAA certificate represents. This occurred as the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the rules and policies of the FAA, Federal Aviation Act of 1958, Administrative Procedure Act, and U.S. Constitution.

(a) The FAA "rule" that the Administrator may in any given air-safety enforcement case, where the accused holds an FAA certificate, choose between two entirely separate and disparate systems of justice, and by that choice determine how the accused will be punished, even before he's advised he's being charged with a violation, to understate the matter by several magnitudes, has a "substantial" impact on the public. FAA failure to promulgate such a rule, including criteria for how the choice is made, through the

public notice and comment requirements of the Administrative Procedure Act denied plaintiffs their right, as "interested persons," to participate in such rulemaking. Failure to promulgate such a rule is part of continuing and concerted efforts by DOT-FAA officials to cover up their lack of authority for license penalties, or to choose them over a money fine, which coverup allowed the threat against Mall Airways to be meaningful and the punitive certificate actions to be conducted against plaintiffs Valentine and Ford.

(b) Although they never articulate it, DOT, FAA and NTSB officials claim that the FA Act of 1958, section 609, 49 U.S.C. § 1429(a), authorizes the Administrator to impose a license suspension or revocation as an alternative penalty to a civil-money fine, and to put the case on a track of administrative justice, rather than send it to a United States Attorney where it would

be prosecuted in United States District Court with right to jury trial. Since section 609 contains no language that even hints at such power, such as, words like "violation," "offense," "sanction," "penalty," "rule," etc., nor mentions civil penalties, such a claim on its face is a statement of general policy and/or an interpretation of general applicability formulated and adopted by the FAA. As such it is required by the Administrative Procedure Act, 5 U.S.C. § 552(a)(1), to be published in the *Federal Register*. The FAA has never done so. That failure denied plaintiffs their lawful right to be notified by the FAA in the federal government's official publication of record of such policy and the agency's interpretation of its basic charter. Failure to lawfully publish such policy or interpretation is part of a continuing and concerted effort by DOT-FAA officials to

cover up their lack of authority for license penalties or to choose them over a money fine, which coverup allowed the threat against Mall Airways to be meaningful and the punitive certificate actions to be conducted against plaintiffs Valentine and Ford.

(c) Prior to 1962, the FAA's civil penalty rule faithfully recited the language of the Federal Aviation Act of 1958 concerning civil penalties: "Any person who violates any rule, regulation or order of the Administrator *shall be* subject to a civil penalty." In 1962 the FAA rewrote this rule to provide that "a person *is* subject to a civil penalty." This change was made surreptiously and published in the *Federal Register* without any notice to the public therein that the agency was reinterpreting its basic charter, and without use of the public notice and comment procedures required by the Administrative Procedure

Act, 5 U.S.C. § 553. It was clearly done to mislead the public, who might otherwise ask how it was that their pilot's license was being suspended for a violation when the FAA's own rule provided that for "any" violation they "shall be" subject to a money fine. This surreptitious change, and its perpetuation by the present lawyers of the DOT, FAA and NTSB was and is a fraud on the public; it has denied plaintiffs their right under the Administrative Procedure Act to be officially notified of such a reinterpretation of the FAA's basic charter and to participate in its making. It also denied them the right to have their government advise them honestly and forthrightly as to the laws under which they must govern their conduct, rather than deliberately mislead them. The continued use and acceptance of a civil penalty rule which misrepresents the law is part of continuing and concerted action by DOT, FAA, and NTSB

lawyers to cover up their lack of authority to impose license penalties and to choose them as an alternative to a a money fine, which coverup allowed the threat against Mall Airways to be meaningful and the punitive certificate actions to be conducted against plaintiffs Valentine and Ford.

(d) Under the Federal Aviation Act of 1958 all agency authority is vested in the Administrator. (After creation of the Department of Transportation in 1966, it was delegated to him by the DOT Secretary.) By law, 49 U.S.C. § 1344(d), in order for other FAA employees or agents to act in his name, the Administrator is expressly required to formally delegate his authority to agency officials for whatever particular purpose it is to be used. The Secretary of Transportation has never delegated to the FAA Administrator, nor the Administrator ever delegated to subordinate FAA officials

the authority to order the suspension or revocation of a certificate issued by the FAA *as a penalty* for the violation of a Federal Aviation Regulation. This failure denied plaintiff Knipe his right to have such authority, for the threatened revocation against Mall Airways, and for the license-penalty actions initiated against plaintiffs Valentine and Ford, officially delegated to the FAA officials who were responsible for them so that they might have lawful notice of the extent of their authority and a means to determine whether they were acting within its boundaries.

43. In addition to the foregoing means of perpetuating a coverup, FAA lawyers, when agency authority for license penalties and administrative trials is challenged in courts of appeal, engage in other deceptive tactics. They cite as authority for license penalties the first three cases that

appeared to uphold them: *Wilson v. C.A.B.*, *Hard v. C.A.B.* and *Pangburn v. C.A.B.* Yet these officials know that these cases, and any subsequent case that follows them, have no validity because they are based on a fundamental mistake of fact (the system under attack started in 1926, not 1938) that renders them invalid as precedent. Moreover, they know that in the *Wilson* brief--the only time executive branch officials have ever formally stated their authority, they claimed it came from the Air Commerce Act of 1926 and that the Civil Aeronautics Act of 1938, which *Wilson* and the rest looked to, had nothing to do with it. Yet these officials continue to cite those cases to support their claims. Additionally they prepare briefs for the appeals courts that are designed to mislead them; they do this by omitting to concede that DOT, FAA, and NTSB officials claim the FAA has authority to deny the citizen

his right to "demand" trial by jury for "any offense"; by raising false issues in briefs which have no logical or legal connection to those raised by the petitioner seeking to vindicate his rights, but which may appear to be supported by earlier cases.

44. In addition to the above, DOT, FAA and NTSB officials promote the coverup, when questioned about their authority, by dissembling to other executive branch officials, members of Congress, private lawyers and plain citizens.

45. NTSB officials, and its general counsels, have specifically participated in and continued the coverup. They created and continue to use rules governing section 609 cases which were designed to obfuscate the fact that license suspensions and revocations are used as penalties for safety violations. For instance, those rules never use the term "violation." They

do not make clear--so that laymen might understand--that there is a dichotomy in the use of section 609: one branch strictly for qualifications matters (failure, say, to take or pass a flight test after an accident), where the only issue is the reasonableness of the FAA action); the other, strictly to determine guilt when charged with a safety violation, and assess a penalty.

46. The proximate cause of this six-decade long and continuing coverup is due to the negligent supervision and training of the Secretary of Transportation, his top officials and General Counsel, and the FAA Administrator and his top officials of, for the most part, DOT and FAA lawyers. *But for* this coverup, the events which occurred to Mall Airways and plaintiffs Knipe, Valentine and Ford, would not have taken place.

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47. Under date of 17 September, 1991, plaintiff Richard X. Knipe submitted a claim based on the allegations herein in the amount of $40,000,000.00 to the Federal Aviation Administration. Acknowledging its receipt as of 18 September 1991, under date of 6 May 1992, via certified mail, his claim was rejected by the Federal Aviation Administration.

48. Under date of 17 September, 1991, plaintiff Glenn A. Valentine submitted a claim based on the allegations herein in the amount of $15,000,000.00 to the Federal Aviation Administration. Acknowledging its receipt as of 18 September 1991, under date of 6 May 1992, via certified mail, his claim was rejected by the Federal Aviation Administration.

49. Under date of 28 December 1991, plaintiff Bernard C. Ford submitted a claim based on the allegations herein in the amount of $15,000,000.00 to the Federal

Aviation Administration. Acknowledging its receipt as of 2 January 1992, under date of 6 May 1992, via certified mail, his claim was rejected by the Federal Aviation Administration.

INJURIES SUFFERED

50. As a direct and proximate result of the foregoing acts and omissions on the part of defendant United States of America's agents, servants and employees, their carelessness and negligence, plaintiffs Richard X. Knipe, Glenn A. Valentine, and Bernard C. Ford have suffered, and will in the future continue to suffer:

PLAINTIFF RICHARD X. KNIPE

(a) Economic loss:

i) Destruction of his company, Mall Airways, Inc.;

ii) Loss of income, past, present and future;

iii) Costs incurred in defending the

enforcement actions against both Mall Airways and himself;

iv) Defamation of his reputation as pilot and manager of an air carrier which has and will harm his career in aviation reducing his future income therefrom;

(b) Personal injury by way of mental distress.

PLAINTIFF GLENN A. VALENTINE

A. Economic loss:

i) Loss of income, past, present and future;

ii) Costs incurred in defending the enforcement action taken himself;

iii) Defamation of his reputation as pilot and manager of an air carrier which has and will harm his career in aviation reducing his future income therefrom;

B. Personal injury by way of mental distress.

PLAINTIFF BERNARD C. FORD

A. Economic loss:

i) Loss of income, past, present and future;

ii) Costs incurred in defending the enforcement action taken himself;

iii) Defamation of his reputation as pilot and manager of an air carrier which has and will harm his career in aviation reducing his future income therefrom;

B. Personal injury by way of mental distress.

RELIEF REQUESTED

WHEREFORE, plaintiffs pray for judgment against the defendant United States of American as follows:

PLAINTIFF RICHARD X. KNIPE

I. For compensatory damages, the sum of Thirty Million Dollars ($30,000,000.00).

II. For personal injury by way of mental distress, the sum of Ten Million Dollars ($10,000,000.00).

PLAINTIFF GLENN A. VALENTINE

I. For compensatory damages, the sum of

Ten Million Dollars ($10,000,000.00).

II. For personal injury by way of mental distress, the sum of Five Million Dollars ($5,000,000.00).

PLAINTIFF BERNARD C. FORD

I. For compensatory damages, the sum of Ten Million Dollars ($10,000,000.00).

II. For personal injury by way of mental distress, the sum of Five Million Dollars ($5,000,000.00).

ALL PLAINTIFFS

III. For costs of suit and such attorney fees as are allowed by law.

IV. For such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

Lawrence B. Smith
Attorney for Plaintiff
Bar Code #103590

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Filed Mar. 14, 1994

RICHARD X. KNIPE, GLENN A. VALENTINE, and BARNARD C. FORD,

Plaintiffs,

-against- 91-CV-1338

SAMUEL K. SKINNER, Secretary of the Department of Transportation; James B. busey, IV, Administrator of the Federal Aviation Administration; et al.

Defendants.

On March 3, 1994, the United States Court of Appeals affirmed the district court's decision to impose sanctions on plaintiff in Knipe v. Skinner, 146 F.R.D. 58 (N.D.N.Y. 1993) and the case was remanded to this court so that it may exercise its discretion whether to impose sanctions as provided in the 1993 amendments to Fed.R.Civ.P.11.

Accordingly, using its discretion, the court affirms its previous decision to impose sanctions pursuant to Fed.R.Civ.P.11 against plaintiff in the amount of $9,000.

IT IS SO ORDERED.

Dated at Binghamton, New York
March 9, 1994

/s/ Thomas J. McAvoy
Chief U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Filed Mar. 14, 1994

RICHARD X. KNIPE, GLENN A. VALENTINE, and BARNARD C. FORD,

Plaintiffs,

-against- 92-CV-1389

UNITED STATES OF AMERICA

Defendant.

On March 3, 1994, the United States Court of Appeals affirmed the district court's decision to impose sanctions on plaintiff in Knipe v. United States, 151 F.R.D. 24 (N.D.N.Y.) 1993) and the case was remanded to this court so that it may exercise its discretion whether to impose sanctions as provided in the 1993 amendments to Fed.R.Civ.P.11.

Accordingly, using its discretion, the

court affirms its previous decision to impose sanctions pursuant to Fed.R.Civ.P.11 against plaintiff [sic] in the amount of $7,252.89.

IT IS SO ORDERED

Dated at Binghamton, New York
March 9, 1994

/s/ Thomas J. McAvoy
Chief U.S. District Judge

Supreme Court, U.S.
FILED
DEC 20 1994
OFFICE OF THE CLERK

(3)

NO. 94-728

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

In re LAWRENCE B. SMITH,

Petitioner.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, THE HONORABLE JOHN O. NEWMAN, CHIEF CIRCUIT JUDGE, THE HONORABLE RALPH K. WINTER, CIRCUIT JUDGE, THE HONORABLE DENNIS G. JACOBS, CIRCUIT JUDGE; THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, AND THE HONORABLE THOMAS J. MCAVOY, CHIEF DISTRICT JUDGE

SUPPLEMENTAL BRIEF FOR THE PETITIONER

LAWRENCE B. SMITH
3938 E. GRANT RD., #191
TUCSON, ARIZONA 85712
602/326-0283

Petitioner Pro Se

OCTOBER, 1994

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, Petitioner submits this supplemental brief. We call the Court's attention to the following significant cases which came to Petitioners' attention after his petition for an extraordinary writ was filed: *Roundtree v. United States*, No.93-35792; and *In re: Lawrence B. Smith; Roundtree v. United States*, No. 93-36160, slip op. 14271 (9th Cir. Nov. 22, 1994) (1994 WL 652780) (combined opinion).

Both the *Roundtree* case-in-chief and Rule 11 sanction matter demonstrate the same pattern described in our petition: neither Justice Department counsel, district court, nor appeals court, deal individually with the carefully separated counts in the complaint (attached hereto as an exhibit). Moreover, the Ninth Circuit declined to remand to the district court to rectify those deficiencies. "The unique

history of specious legislation [sic!] fostered by Smith indicates that a just application of the rules to this case militates . . . [against remand.]" *Roundtree,* Slip Op. at 14281.

Is it legal heresy to challenge an enforcement system of administrative justice that can deprive a person of his livelihood when no language is contained the United States Code, Code of Federal Regulations, Federal Register, or legislative history, that even hints at a connection between safety violations and suspension or revocation of an airman's license as a penalty? Is it responsible judicial conduct for courts to ignore this?

Preliminarily, it should be noted that in order to affirm district court dismissal for lack of subject matter jurisdiction the appeals court engaged in a sort of Fed.R.-Civ.P. 12(b)(6) dismissal, or a form of Rule 56 summary judgment. This, without any

factual record of affidavits or discovery to support it and ignoring what each individual count asserts. This violated the principle that the allegations of the complaint must taken as true. "[T]he decision we review was entered on a motion to dismiss. We therefore 'accept all of the factual allegations in [Gaubert's] complaint as true' and ask whether the allegations state a claim sufficient to survive a motion to dismiss. [citing case]."*U.S. v. Gaubert*, ___ U.S. ___, 111 S.Ct. 1267, 1276 (1991). "What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of the complaint's factual allegation. District court judges looking to dismiss claims on such ground must look elsewhere for legal support. "*Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

The Ninth Circuit's analysis violated the principle that "A federal district court is under a mandatory duty to dismiss

a suit over which it has no jurisdiction. [Citing cases.] When a court must dismiss a case for lack of jurisdiction, the court should not adjudicate the merits of the claim."*Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1157 (5th Cir. 1981).

Roundtree v. United States, is in direct conflict with *Mace v. Skinner*, 34 F.3rd 854, 857 (9th Cir. 1994). *Mace* is a *Bivens* action involving many of the same issues. Although *Roundtree* cites that case (*"cf."*), Slip Op. at 14276, the decision provides no analysis. *Mace* reversed and remanded the case to the district court because there was subject matter jurisdiction, in spite of 49 U.S.C. app. § 1486 (1993 supp.). In *Roundtree*, the panel takes the opposite view. The two cannot be reconciled.

A few examples underscore the critical need, if justice is to be done for Petitioner, of dealing with individual

counts. "Here Roundtree seeks to attack the whole underlying basis of the FAA's authority to issue and enforce rules and regulations which affect certificates." *Roundtree*, Slip op. at 14278. The Complaint ¶ 27, a-27, does state that "The only form of penalty ever authorized by Congress for violations of air-safety rules is the civil-money fine. . ." If this is not true, all the government and courts need do is cite the statute that authorizes suspension or revocation as a penalty. They do not, because they cannot.

The problem is again illustrated by the above language about authority "to issue and enforce rules and regulations." Had government and courts dealt with individual counts, the plaintiff could have pointed out that the majority of counts do not challenge but assume authority to promulgate a given rule. The problem is that Federal Aviation Administration (FAA) offi-

cials have failed to issue any rules regarding license penalties. In some instances they are charged with violating the agency's own policies ("rules"):

Paragraph 20, a-16 — "Violation of agency emergency guidelines." Paragraph 21, a-18 — "No emergency rule with criteria." Paragraph 22, a-19[1] — "No 'compliance disposition' rule." Paragraph 25, a-24 — "No Part 135 fraudulent record-entry rule." Paragraph 28, a-29 — "No license-penalty rule." All of these assume the FAA has authority to adopt such rule. But how can it not be negligence for an agency to implement a host of policies in order to

---

1. See Beins v. United States, 695 F.2d 591 (D.C. Cir. 1982); *see also Harr v. United States*, 705 F.2d 500, 504 (1983) ("We believe the government's argument misses the point that the FAA can be liable for negligent actions of its medical certification staff, and that Harr indeed alleged such negligence.").

suspend or revoke certificates as a penalty but fail to tell the public about them in its own rules, especially when no statute exists that hints at such power?

The *Roundtree* opinion does contain a single exception: a footnote, Slip Op. at 14279 n. 2, adverts to the defamation charge, Complaint ¶ 29, a-30, involving the harm done by agency officials issuing a press release and making oral statements that branded Mr. Roundtree a criminal before any trial. It illustrates the problem, however. Had counsel for plaintiff been able to address this issue below, this case would have been cited: *Johnson v. Sawyer*, 980 F.2d 1490 (5th Cir. 1992), and 4 F.3d 369 (5th Cir. 1993). There an insurance executive made a plea bargain with the IRS that included a press release so constructed it would not reveal who he was. Involved was less than $3,500. In violation of the agreement, IRS issued a press re-

lease that allowed his company to find out about the matter. He was fired. The district court held that it had Federal Tort Claims Act (FTCA) jurisdiction (the complaint started as a *Bivens* action and was later amended to include the FTCA.) It awarded Mr. Johnson some $11 million dollars. FTCA jurisdiction and the judgment (with some modification) were upheld

How can it be said there is no reasonable argument for the defamation claim? If other technical legal language would have been more appropriate, rather than the term "defamation," Mr. Roundtree should have had an opportunity to amend his complaint accordingly.

A further example: Citing *Go Leasing, Inc. v. National Transp. Safety Bd.* 800 F.2d 1514 (9th Cir. 1986), the *Roundtree* court stated: "In that case, we expressly held that the FAA has the discretionary authority both to select sanctions and to

impose sanctions upon certificate holders. *Id.* at 1518-20." *Roundtree,* Slip Op. at 14279. Neither *Go Leasing* nor any other case has ever been developed based upon a record of affidavits or discovery that explains how the FAA enforcement program works. (The government is shielded by the very fact there are no rules!) No case has ever quoted 49 U.S.C. app. § 1471(1) (1993 supp.) which reads "Any person who violates . . . any provision of [this Act] or . . . any rule, regulation or order issued thereunder . . . shall be subject to a civil penalty of not to exceed $1,000 for each such violation . . ." And explained why that explicit language does not mean what it says. 49 U.S.C. app. § 1473(a) (1993 supp.) reads: "The trial of any offense under this chapter shall be in the district in which such offense is committed . . ." Section 1473(b)(1) provides that "either party may demand trial by jury of any issue

of fact if the value in controversy exceeds $20 . . ." No case has ever recognized that in choosing between a civil penalty and a license penalty for the same safety violation FAA officials determine not only whether the airman gets a judicial or administrative trial, determine his punishment even before he is charged, and determine whether or not he will ever have an opportunity to "demand" jury trial. If any precedent supports such a situation, justice requires the government and courts to advise petitioner of it.

Respectfully submitted,

_____

Lawrence B. Smith
Petitioner Pro Se

Filed Oct. 23, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J92-029 CIV

DANE T. ROUNDTREE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL COMPLAINT UNDER THE
FEDERAL TORT CLAIMS ACT

Plaintiff Dane T. Roundtree complaints and alleges:

1. This action arises under the Federal Tort Claims Act, Sections 2671 through 2680 of Title 28 of the United States Code (28 U.S.C. §§ 2671-2680). This Court is vested with jurisdiction pursuant to Section 1346-(b) of Title 28 of the United States Code (28 U.S.C. § 1346(b)).

2. Plaintiff Dane T. Roundtree is a resident of Petersburg, Alaska.

3. On 13 November 1989 the Federal Aviation

Administration issued an Emergency Order that revoked the Part 135 (14 CFR pt 135) air-taxi operating certificate of Alaska Island Air, Inc. (AIA), of Petersburg, Alaska. At the same time it issued a Notice of Proposed Certificate Action proposing to revoke plaintiff Roundtree's Airline Transport Pilot (ATP) certificate. Revocation of AIA's operating certificate and the proposed revocation of Roundtree's pilot license were based on a virtually identical set of violations of certain Federal Aviation Regulations (FARs) allegedly committed by Roundtree.

4. On 28 October 1991 an Order of Suspension, detailing later charges from events alleged to have occurred on 12 February 1991 (largely involving failure to tie down a piece of cargo), was issued against plaintiff. The earlier revocation case against him, although having been left in limbo for two years, was revived and sever-

al of the charges combined with the new case. The 1989 charges of falsification of records, however, were dropped--they had been soundly defeated in the AIA case--and a total suspension penalty of 150 days for the combined cases was ordered 28 October 1991.

5. The revocation order for AIA, after reciting the alleged violations, provided:

> By reason of the foregoing, the Administrator has determined that you do not possess the care, judgment, and responsibility required to hold such certificate and that safety in air commerce and the public interest require the revocation of your air carrier operating certificate.
>
> Further, the Administrator has determined that an emergency exists and that safety in air commerce and the public interest require the immediate effectiveness of this Order.

The November 1989 notice regarding revocation of Roundtree's pilot license contained similar language. Because it was not an "order" but only a notice of *proposed* certificate action it inherently could not be issued on an emergency basis, thus leav-

ing plaintiff with the automatic stay provided by 49 U.S.C. § 1429(a) of the effective date of any suspension or revocation order that would follow.

6. After detailing the remaining 1989 charges and those from the alleged February 1991 incident, the combined order against Roundtree stated:

> By reason of the foregoing, the Administrator has determined that safety in air commerce or air transportation and the public interest require the suspension of your Airline Transport Pilot Certificate.
>
> NOW, THEREFOR, IT IS ORDERED, pursuant to the authority vested in the Administrator by Section 609 of the Federal Aviation Act of 1958, as amended, that:
>
> (1) Any airman certificate now held by you, including Airline Transport Certificate No. 574328098, be and hereby is suspended [for 150 days]. . . .

7. All orders were issued in the name of the FAA Administrator. The emergency revocation order for AIA was signed by John C. Curry, FAA Assistant Chief Counsel for the Alaskan Region; the concurrent notice proposing revocation of plaintiff was sign-

ed in Curry's name by his assistant Donald E. Borey; the much later order combining the two cases against plaintiff personally were signed in Curry's name by staff lawyer Howard L. Martin Jr.

8. All orders were issued under the claimed authority of sections 609 of the Federal Aviation Act of 1958, as amended ("FA Act"), 49 U.S.C. §§ 1429(a); and under a delegation of authority, contained in 14 CFR § 13.19, from the Administrator to the Assistant Chief Counsels for various FAA administrative regions, and certain others, to issue suspension and revocation orders on his behalf. Section 1005(a), 49 U.S.C. § 1485(a) was cited as additional authority for the emergency revocation of AIA.

9. The case against AIA went to trial ear ly on Thursday 14 December 1989 before a National Transportation Safety Board administrative law judge ("ALJ") and ended late in the evening of the next day, Friday

15 December. FAA lawyers Donald E. Borey and Delinda L. Wall served as FAA trial counsel. In his Initial Decision the ALJ ruled there were no grounds for revocation and held for AIA. The next day Curry returned AIA's operating certificate and notified NTSB General Counsel John M. Stuhldreher that the FAA was dropping the emergency claim and would no longer seek revocation. Later, however, Curry appealed certain of the charges to the full five-member NTSB Board asking it to suspend AIA's operating certificate for 120 days. In the meantime AIA--the corporate shell with its certificate authorizing scheduled service--was sold. (The NTSB ultimately upheld a suspension of 150 days for AIA's air-taxi certificate, although the company had long had new owners.) When the combined case against plaintiff Roundtree finally came to hearing, it was settled with a 30-day suspension on the basis of a couple of

minor charges.

10. Plaintiff Dane Roundtree at the time of the emergency revocation was owner of Alaska Island Air, Inc., buying it from his father Lloyd Roundtree, who in 1967 had essentially started the company and built it into a significant multi-plane scheduled and on-demand operation. In 1989, by now reduced in size to a two-plane operation because of competition fostered by deregulation, the company was sound financially. After the shutdown, which occasioned the loss of several regular customers and a severe depletion of its cash reserves, the company's financial situation deteriorated and plaintiff Roundtree was forced to sell the corporation, along with certain assets, principal one of which was its operating certificate and transferable authority to fly scheduled air-taxi service and carry the United States mail, authority it had held for more than twenty years.

11. Revocation of AIA's operating certificate, and Roundtree's pilot license, and use of the Administrator's emergency power against AIA causing its immediate shutdown, were rationalized because of charges that Roundtree had cooked the company books. Among others: the number of training hours given two new pilot-applicants, and that he "made or caused to be made fraudulent or intentionally false entries in a logbook, record, or report" required to be kept by an operator.

12. Concurrently with issuing and serving the emergency revocation order on Alaska Island Air, Paul Stuecke, FAA press spokesman for the Alaskan Region, told the press, among other things, that AIA, meaning Dane Roundtree, who at the time was the manager and only pilot of the operation, "intentionally made false entries in records to show compliance with federal regulations." Additionally, "The revocation

is automatic because of fraudulent entries," and referring to other carriers recently grounded by the Alaskan Region, he told the media that all nine were cited for the same "significant" item, "fraudulent" paperwork. These defamatory charges, as well as others, made to the media by means of a press release and orally, were completely untrue; neither plaintiff Roundtree nor AIA had been convicted of any such offenses at the time they were so made; and, subsequently AIA and Roundtree were totally exonerated.

13. At times relevant to the claims made herein: Samuel K. Skinner, as Secretary, Department of Transportation, had overall responsibility for the various modalities of that Department, including the Federal Aviation Administration; James B. Busey IV, as FAA Administrator, was directly responsible by law and delegation of authority from Secretary Skinner, for all agency

actions.

14. At times relevant to the claims made herein, the following were directly responsible for supervising, implementing and conducting the FAA's regulatory enforcement program at both DOT and FAA headquarters in Washington, D.C.: C. Dean McGrath, Jr., Acting DOT General Counsel; Neil R. Eisner, DOT Assistant General Counsel for Regulations and Enforcement; Kenneth P. Quinn, FAA Chief Counsel; Gregory S. Walden, former FAA Chief Counsel; John H. Cassady, FAA Deputy Chief Counsel; Donald P. Byrne, FAA Assistant Chief Counsel for Regulations and Enforcement; Peter J. Lynch, FAA lawyer, head of the FAA Chief Counsel Office Enforcement Proceedings Branch.

15. At times relevant to the claims made herein, the following were directly responsible for either the initiation, supervision or conduct of the various enforcement actions taken against Alaska

Island Air, Inc. and plaintiff Roundtree, and the press releases: John C. Curry, Assistant Chief Counsel, FAA Alaskan Region; Donald E. Borey, Deputy Assistant Chief Counsel, FAA Alaskan Region; DeLinda L. Wall, former staff lawyer, FAA Alaskan Region; Howard L. Martin Jr., staff lawyer, FAA Alaskan Region; Kenneth P. Quinn, FAA Chief Counsel; Gregory S. Walden, former FAA Chief Counsel; James E. McCoy, FAA inspector; John R. Hallinan, FAA inspector; C. Jonathan Tamplin, manager FAA Flight Standards District Office, Juneau, Alaska; Thomas S. Westall, former head of the FAA Alaskan Region Flight Standards Division; Frank L. Cunningham, former Regional Director, FAA Alaskan Region; Paul Stuecke, former press officer and now a management official with the FAA Alaskan Region headquarters.

16. At times relevant to the claims made herein, the following had overall

responsibility for legal affairs of the National Transportation Safety Board and its handling of FAA certificate actions appealed to the Board: Daniel D. Campbell, NTSB General Counsel; John M. Stuhldreher, former NTSB General Counsel.

17. FAA officials, after investigation and a determination to initiate enforcement action against a suspected violator has been made, unless only low-level administrative action is taken, choose between initiating civil penalty action or punitive certificate action. This occurs even before the alleged violator is given notice he is being charged. The former, with the recent exception to be noted, carries with it the right to "demand" jury trial, with the only possible penalty a money fine; the latter affords trial in a one-man administrative hearing with right of appeal to the full five-member National Transportation Safety Board; the only possible penalty is license

suspension or revocation. The United States District Judge has no authority to change the money-fine to a license suspension, no matter how heinous the offense; the Board cannot change suspension or revocation to a money fine, no matter how severe and disproportionate the impact might be, for instance, on a professional pilot who could lose months of wages, indeed, his job, or an entire business shut down. Ironically, an unlicensed person, who commits the same violation, because there is no certificate to proceed against, is guaranteed his right to be tried in United States District Court with the right to "demand" trial by jury of any fact, as has been provided in law since 1926 and, at the least, pay only a money fine.

18. The FAA Administrator, through subordinates, pursuant to the Federal Aviation Act of 1958, as amended (FA Act), sections 609 and 1005(a), 49 U.S.C. §§ 1429(a) & 1485-

(a), oftimes declares that an emergency exists requiring the immediate effectiveness of a suspension or revocation order (usually revocation). Revocations for a true lack of qualifications occur for medical reasons or, infrequently, when a pilot has had an accident and then refuses to take, or flunks, a flight test. Almost always, emergency revocations are based either on the perceived seriousness of a single violation, like flying under the influence or, in the case of an operator, on a series of alleged violations which usually have occurred over a period of time but are discovered in a narrow time-frame during inspection of company records. Although some are often one, two or three years old, these are lumped together in a single order and revocation justified because the violations demonstrate that the pilot, mechanic or operator lacks the "care, judgment, and responsibility"

required by the FAA of any certificate holder. In other words, maintaining such a standard is a qualification of holding the certificate and a "rule" of the agency. Within both FAA and NTSB it is also known as the "Compliance Disposition" rule. The emergency power is used on grounds the continued exercise of the privileges of the particular certificate by its holder constitutes an immediate threat to air safety and the public.

19. At the above mentioned times and places, and at others unknown, defendant, through its agents, servants and employees, was negligent in the training and supervision of the officials specifically named herein, and others unknown. This negligence allowed DOT, FAA, and NTSB officials in turn to negligently implement and apply to plaintiff Dane T. Roundtree and his company Alaska Island Air, Inc., or neglect to follow: (1) DOT-FAA standards, rules and

policies; (2) provisions of the FA Act; (3) laws governing authority of the NTSB over FAA certificate orders; (4) the Administrative Procedure Act; (4) Constitution of the United States. All of the negligence asserted herein occurred during and within the conduct of the business of the United States government and within the course and/or scope of employment of its agents, servants and employees. Such negligence was the proximate cause of the events and damages which occurred to Dane T. Roundtree and Alaska Island Air, Inc., which were as follows:

20. **Violation of agency emergency guidelines** -- The agents, servants and employees of the defendant carelessly, recklessly and negligently applied the FAA guidelines or "rule" on use of the emergency power against the operating certificate of Alaska Island Air, Inc. There was no rational basis for its use. The agency enforcement

manual provides:

> A. Emergency suspension or revocation of a certificate should be used only as an emergency safety measure and to provide immediate protection to the public. Therefore, emergency actions should be taken as soon as possible after the date of the incident. Moreover, the longer the interval between the date of the incident and the date of the action, the more difficult it will be for the FAA to establish that an emergency exists.
>
> B. An emergency suspension or revocation should never be used for punitive reasons. When receiving a recommendation for emergency action, legal counsel should ensure that there is sufficient evidence of an emergency requiring immediate effectiveness of an order of suspension or revocation . . .

The charges against the company had nothing to do with whether Dane Roundtree or his aircraft were safe to fly with. After twenty-three years without harm to any passenger, or crashing any aircraft, when the company was operating up to six aircraft, and given plaintiff's then 15,000-hours-plus of flying time (now 18,000), there was absolutely no basis to conclude there was any threat to air safety or the public, much less, an immediate threat.

Moreover, the emergency power was in fact used as summary punishment for the perciev-ed fraudulent recordkeeping the Alaskan FAA officials felt Roundtree guilty of. Their violation of the agency's own guidelines violated plaintiff's right to have the agency follow its own rules.

21. **No emergency rule with criteria** -- Although such a rule did exist with the Civil Aeronautics Administration (CAA), from which the original Federal Aviation Agency was transmogrified in 1958, the FAA Administrator has failed to promulgate a rule explaining his emergency power, especially one which would contain as a guide for both agency officials and the public the standards and criteria by which that power is to be employed. In fact, however, the Administrator has established, at least in part, such criteria, those which are set forth in the preceding para-graph, and which are basically those set

forth in the old CAA rule. To understate the matter by several magnitudes, the emergency power has a "substantial" impact on the public. The failure to promulgate FAA emergency standards and criteria through the public notice and comment requirements of the Administrative Procedure Act denied plaintiff his right, as an "interested person," to participate in such rulemaking and have official notice of those criteria. This failure was due to the careless, reckless and negligent interpretation and application by defendant's agents, servants and employees of the Administrative Procedure Act, 5 U.S.C. § 553. Had there been publicly developed criteria the standards of the FAA might not have been so easily violated when used against AIA.

22. **No "compliance disposition" rule** -- In rare instances, revocation is based on an actual lack of qualifications, such as, demonstrated lack of skill as pilot or

mechanic by failure to pass a flight or written test, or refusal to take such when there is a reasonable basis for such a request by FAA officials. By far, most revocations, especially of pilots and air-taxi operators, are based on the claim that the certificate holder has committed either one or two very serious safety violations, like flying under the influence, or a series of alleged violations. In the case of an operator, these are usually turned up by an indepth inspection of company records and interviews of employees, past and present. Based on such a list of unproven charges, FAA officials assert that on their account the operator lacks the "care, judgment, and responsibility" required of a certificate holder, and that failure to maintain such a standard indicates a lack of qualifications to hold the certificate. On its face this is, as noted, a "rule"--known as the "Compliance Disposition" rule.

It is the linchpin justifying revocation and the use of the emergency power; it has a substantial impact on certificate holders. Although there once was an FAA project to draft and promulgate such a rule, it has never been lawfully promulgated. The failure to promulgate such a rule through the public notice and comment requirements of the Administrative Procedure Act, or simply place it in the *Code of Federal Regulations* (CFR), denied plaintiff and AIA their right, as an "interested persons," to participate in such rulemaking, and the failure, at minimum, to publish it in the *Federal Register* or *Code of Federal Regulations* violated their right to have official notice of fundamental agency policies. This failure has been due to the careless, and reckless negligence of defendant's agents, servants and employees in interpreting and applying the Administrative Procedure Act, 5 U.S.C. §§ 552(a)(1) and 553.

23. **No TRO type hearing for emergencies** -- It is a fundamental constitutional requirement that any person, before the government deprive him of life, liberty or property, be given adequate notice to prepare for and the right to participate in a prompt hearing; or, if action must be taken on an immediate basis without prior notice, such as, might occur with a judicial temporary restraining order (TRO), a hearing be held quickly as possible, always within ten days. The emergency power granted the Administrator in FA Act sections 609(a) and 1005(a), 49 U.S.C. §§ 1429(a) & 1485(a), is unconstitutional on its face: it is tantamount to an executive-branch TRO but provides for no hearing either before or immediately after the issuance of an emergency order of suspension or revocation, the purpose of which would be to determine whether or not a true emergency exists, or whether FAA officials are abus-

ing the power by using it as punishment, a use contrary to agency policy. DOT-FAA officials are well aware that the NTSB takes the position it has no authority to determine if a true emergency exists, or the power to do anything about it if they found that it did not. Yet FAA officials have full authority to provide such a hearing, but choose not to use it. Pursuant to the FA Act, section 1007, 49 U.S.C. § 1487, FAA officials have a Congressional mandate which specifically authorizes them to apply to a United States District Court for injunctive relief to stop any threat to air safety because of safety violations. This would have provided the due process constitutional protections afforded by the Federal Rules of Civil Procedure, in particular Rule 65(b). The emergency shutdown of Alaska Island Air, without an immediate judicial hearing on whether there was a true "emergency," violated plaintiff's

right to due process. This was the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the U.S. Constitution.

24. **Fraud charges without foundation** -- The charges that plaintiff Dane Roundtree made fraudulent record entries were totally without foundation and the result of the careless, reckless and negligent investigation made by defendant's employees James E. McCoy and John R. Hallinan. That they were carried forward through and reviewed by several levels of the Alaskan Region bureaucracy and then charged and tried before the NTSB was due to the careless, reckless and negligent conduct of defendant's agents, servants and employees.

25. **No Part 135 fraudulent record-entry rule** -- Both the emergency order of revocation against AIA and the proposed revocation of plaintiff's ATP charged that he had

"made or caused to be made fraudulent or intentionally false entries in a logbook, record, or report" required to be kept by an operator. Rules governing record entries required to be made and kept by an air-taxi operator are contained in 14 CFR pt 135. Part 135 contains no rule prohibiting "fraudulent" entries, nor do the FARs contain any general rule to that effect. Certain other FAR Parts do contain such a rule but by their own terms are limited to the particular activities covered by that Part. Charging AIA and plaintiff with an offense covered by no regulation was due to the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the agency's own rules, the Federal Aviation Act of 1958, as amended, and the U.S. Constitution.

26. **License penalties created by the bureaucracy** -- The use of suspensions and

revocations of pilot, mechanic or operating certificates by the FAA as a penalty or sanction for the violation of safety regulations is contained in no statute, no rule in the Code of Federal Regulations, nor in any published interpretation in the Federal Register. Only Congress may constitutionally create penalties, sanctions, or benefits, that is, it may not delegate its *Article I, Section I*, legislative authority to any other branch of the government. This constitutional principle is codified in the Administrative Procedure Act, 5 U.S.C. § 558. The use of certificate suspensions and revocations as penalties is now and always has been, since the federal government first initiated regulation of aviation through the Air Commerce Act of 1926, a creation of the executive branch, not Congress. And this in the face of plain language that states in 49 U.S.C. § 1471 that "Any persn who violates any rule, regula-

tion or order shall be subject to a civil penalty . . ." The imposition of certificate penalties on Alaska Island Air, Inc. and plaintiff Dane Roundtree was due to the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the Federal Aviation Regulations, the Federal Aviation Act of 1958, as amended, and the U.S. Constitution.

27. Money fines, judicial trial and right to demand jury --

(a) The only form of penalty ever authorized by Congress for violations of air-safety rules is the civil-money fine. 49 U.S.C. § 1471. FAA use of the punitive certificate action procedure denied plaintiff and his company, Alaska Island Air, Inc., their statutory right to try to effect a compromise settlement on any legitimate violation and/or pay a money fine for any violations of which they were found

guilty after judicial trial.

(b) No statute authorizes trial of air-safety violations before the National Transportation Safety Board. At all times relevant to the issues herein, the only judicial forum authorized in the Federal Aviation Act of 1958, originating in 1926, seminal year of federal regulation of aviation, and continuing to the present, was United States District Court. There was no lawful right try the safety violation charges against AIA or plaintiff Roundtree before the NTSB, or lawful right on the part of the NTSB to accept such cases when the law, 49 U.S.C. § 1473, provides that "any offense" shall be tried in federal district court.

(c) In addition, since 1926 "any" person who violates "any" air-safety rule, regulation or order has had the absolute right to "demand" trial by jury of any issue of fact, if the value in controversy exceeds

$20. 49 U.S.C. §§ 1471 & 1473. Use of certificate action against AIA and Roundtree, individually, for alleged safety violations denied them their statutory right to pay a money fine, have trial in federal district court, with right to demand a jury. These actions were due to the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the Federal Aviation Act of 1958.

28. **No license-penalty rule** -- The Federal Aviation Administration has never promulgated a general rule that warns pilot, mechanic or operator that his license is at risk for the violation of any safety rule; nor a rule which advises that the Administrator claims the power to decide in his absolute discretion to have such charges tried administratively before the NTSB, incurring suspension or revocation, rather than in United States District

Court with the only penalty a money fine. The failure to put such a rule in the Federal Aviation Regulations and cause it to be published in the *Code of Federal Regulations* denied plaintiff and AIA the right have notice of such an important and critical DOT-FAA policy which can so drastically affect the property rights that an FAA certificate represents. That failure was the result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the Administrative Procedure Act, the Federal Aviation Act of 1958, as amended, and the U.S. Constitution.

29. **Defamatory press release** -- The making available of a press release and oral comments by FAA officials which told the public plainly that plaintiff and his company Alaska Island Air, Inc. were guilty of acts that constituted federal crimes, even

though they had not yet been tried and found guilty in any forum, violated their right not to be defamed by their government. This occurred because of the careless, reckless and negligent conduct of defendant's agents, servants and employees.

30. The events and actions described herein would not have occurred *but for* the following: negligent supervision and training by Secretaries of Transportation, Administrators of the Federal Aviation Administration, and their general and chief counsels, and other officials, of those DOT, FAA and NTSB employees engaged in rulemaking and regulatory enforcement activities. Nor would they have happened *but for* the negligent and reckless application of the Federal Aviation Act, the laws authorizing NTSB review of FAA certificate orders, the Administrative Procedure Act, United States Constitution, and FAA rules and policies.

31. Under date of 17 September, 1991,

plaintiff Dane T.Roundtree submitted a claim based on the allegations herein in the amount of $8,000,000.00 to the Federal Aviation Administration. Acknowledging its receipt as of 18 September 1991, under date of 6 May 1992, via certified mail, his claim was rejected by the Federal Aviation Administration.

32. As a direct and proximate result of the foregoing acts and omissions on the part of defendant United States of America's agents, servants and employees, their carelessness and negligence, plaintiff Dane T. Roundtree has suffered, and will in the future continue to suffer:

(a) Economic loss:

i) Destruction of his company, Alaska Island Air, Inc.;

ii) Loss of income, past, present and future;

iii) Costs incurred in defending the enforcement actions against both Alaska

Island Air, Inc. and himself;

iv) Damage to his reputation as pilot and manager of an air carrier which has and will harm his career in aviation reducing his future income therefrom;

(b) Personal injury by way of mental distress.

WHEREFORE, plaintiffs pray for judgment against the defendant United States of America as follows:

I. For compensatory damages, the sum of Five Million Dollars ($5,000,000.00).

II. For personal injury by way of mental distress, the sum of Three Million Dollars ($3,000,000.00).

III. For costs of suit and such attorney fees as are allowed by law.

IV. For such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

Lawrence B. Smith
Attorney for Plaintiff

No. 94-728

JAN 20 1995

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

IN RE LAWRENCE B. SMITH, PETITIONER

ON PETITION FOR A WRIT OF MANDMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals, in remanding a case for reconsideration of sanctions imposed under Fed. R. Civ. P. 11 in light of the Rule's amendment in 1993, correctly held that the district court should be afforded discretion in deciding whether to impose sanctions against petitioner under the amended Rule, but that the district court should otherwise apply the version of the Rule in effect at the time the sanctions were originally imposed.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-728

IN RE LAWRENCE B. SMITH, PETITIONER

ON PETITION FOR A WRIT OF MANDMUS
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals affirming the imposition of sanctions on petitioner (Pet. App. a1-a25) is reported at 19 F.3d 72. A previous opinion of the court of appeals, affirming the dismissal of the first complaint filed by petitioner, is reported at 999 F.2d 708. The opinions of the district court concluding that sanctions should be imposed (Pet. App. a26-a37, a41-a51) are reported at 146 F.R.D. 58 and 151 F.R.D. 24. The orders of the district court calculating the amount of the sanctions (Pet. App. a37-a41, a51-a54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1994. A petition for rehearing was denied on May 19, 1994. Pet. App. a25-a26. On July 29, 1994, Justice Thomas granted an extension of time in which to file a petition for a writ of certiorari to and including October

16, 1994. The petition for a writ of mandamus was filed on October 17, 1994 (a Monday). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1651(a). Petitioner also invokes this Court's jurisdiction under 28 U.S.C. 1254(1), if the Court treats the petition for a writ of mandamus as a petition for a writ of certiorari. See Pet. 3.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Before its amendment in 1993, Rule 11 of the Federal Rules of Civil Procedure provided in pertinent part as follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. * * * If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it * * * an appropriate sanction.

The amended version of Rule 11, effective December 1, 1993, is applicable to civil cases pending on that date "insofar as just and practicable." Order Amending Federal Rules of Civil Procedure, H.R. Doc. No. 73, 103d Cong., 1st Sess. 1 (1993). The new Rule provides, in pertinent part, as follows:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney * * * is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and]

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modifica-tion, or reversal of existing law or the establishment of new law[.] * * *

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys * * * that have violated subdivision (b) or are responsible for the violation.

(1) ***How Initiated.***

(A) ***By Motion.*** A motion for sanctions under this rule shall * * * describe the specific conduct alleged to violate subdivision (b). * * *

(3) ***Order.*** When imposing sanctions, the court shall describe the conduct determined to constitute a

violation of this rule and explain the basis for the sanction imposed.

STATEMENT

1. Petitioner is an attorney who represented three plaintiffs in two civil actions filed in the United States District Court for the Northern District of New York. Those actions arose out of an investigation by the Federal Aviation Administration (FAA) into safety violations by Mall Airways, Inc., a commuter airline based in Albany, New York. The investigation revealed that the airline was in violation of emergency safety regulations, and the FAA closed the airline for approximately two months. The FAA also sought, unsuccessfully, to charge Richard Knipe, the controlling owner of Mall, with civil penalties, and to revoke the Air Transport Pilot certificates of Glenn Valentine and Bernard Ford, managers of the airline. See *Knipe* v. *Skinner*, 999 F.2d 708, 709 (2d Cir. 1993).

Knipe, Valentine, and Ford, represented by petitioner as counsel, filed a 19-count *Bivens* complaint[1] for damages against 31 federal officials, including the Secretary of Transportation, alleging violations of their constitutional rights caused by the enforcement of the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, 49 U.S.C. App. 1301 *et seq.*[2] See Pet. App. a54-a113. The district court dismissed the complaint on October 23, 1992, holding that all the defendants had statutory or regulatory authority for their actions, and that the Act

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[1] See *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] Although Ford was named as a plaintiff in the *Bivens* action, the complaint alleged no specific harm to Ford and requested no relief on his behalf. See Pet. App. a110-a113.

met constitutional requirements. Plaintiffs appealed, represented by petitioner. The court of appeals affirmed; it also concluded that the appeal was frivolous, and it ordered petitioner to show cause why he should not be ordered to pay double costs and fees for the frivolous appeal. *Knipe* v. *Skinner*, 999 F.2d at 711.

Four days after the district court dismissed the first action, Knipe, Valentine, and Ford, again represented by petitioner, filed another action, against the United States as defendant, under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680. Pet. App. a114-a186. The FTCA complaint alleged that the United States had negligently supervised and trained the Secretary of Transportation, the Administrator of the FAA, and numerous other federal officials, and had negligently allowed them to develop an unconstitutional regulatory program. See Pet. App. a181. The FTCA complaint was based on the same set of facts as was the *Bivens* action. On April 12, 1993, the district court dismissed the FTCA complaint based on *res judicata*, and also on the ground that the allegations in the complaint fell within the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). See Pet. App. a44.

2. Following dismissal of the first (*Bivens*) action, the defendants in that action moved for sanctions against petitioner under Federal Rule of Civil Procedure 11. The district court granted the motion for sanctions, concluding that "[petitioner's] arguments are not reasonable[,] * * * [petitioner] 'has crossed the line between zealous advocacy and frivolous conduct[,] * * * the instant complaint has no basis in law, and [petitioner] has not [made] a reasonable argument for modification of that law." Pet. App. a35-a36. The court pointed out that petitioner's legal theory had previously been rejected by

four courts of appeals.[3] Although the court acknowledged that petitioner had published a law review article advancing his legal theory and criticizing those decisions as incorrect (*id.* at a33), it observed that "the pleading signed in this matter had no chance of success under the law existing at the time" the complaint was filed (*id.* at a34), and that no intervening Supreme Court or appellate decisions supported petitioner's legal theories (*id.* at a35). The district court subsequently ordered petitioner to pay a sanction of $9,000, covering the defendants' attorney's fees and travel expenses in the *Bivens* action. *Id.* at a39-a41.

After dismissal of the FTCA action, the United States also filed a motion for sanctions under Rule 11. The district court granted the motion, observing that petitioner's arguments concerning the enforcement authority of the FAA raised in the FTCA case were "no different than they were in the [*Bivens*] action" (Pet. App. a46), and concluding that "[t]he root of [the FTCA] action, the previous one decided by this court, and countless other actions filed by [petitioner] is his own personal belief that the [FAA] lacks the authority to do what it has done in this case" (*id.* at a47). The court found that petitioner "failed to recognize the error of his ways concerning these arguments, and therefore violated Rule 11" (*ibid.*), and also that "the instant action was filed with an improper purpose in violation of Rule 11" (*id.* at a47-a48), namely, a "personal agenda against

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[3] The part of the court's opinion citing previous cases rejecting petitioner's theory is omitted from the version reprinted in the appendix, but it can be found in the reported version, 146 F.R.D. at 60. A full exposition of the judicial rejection of petitioner's theory about the unconstitutionality and illegality of the FAA's regulatory actions can be found in *Go Leasing, Inc.* v. *NTSB*, 800 F.2d 1514 (9th Cir. 1986).

the FAA" (*id.* at a50). The court subsequently ordered petitioner to pay a sanction of $7,252.89, an amount attributable to attorney's fees and travel expenses in the FTCA suit. *Id.* at a53.

3. Petitioner appealed both decisions imposing sanctions. As to the *Bivens* action, the court of appeals concluded that "[a] reasonable investigation of the law at the pertinent time would have revealed that [the officials'] alleged conduct did not violate any clearly established constitutional rights of the plaintiffs." Pet. App. a13-a14. In light of the fact that four circuits had rejected most of petitioner's legal theories, the court of appeals agreed with the district court that petitioner "cannot credibly argue that appellees could reasonabl[y] have known in 1988 that their conduct violated clearly established rights." *Id.* at a14. The court also concluded that other claims that had not previously been made to and rejected by other circuits, such as the contention that the FAA's regulatory actions violated the plaintiffs' statutory and constitutional rights to a jury trial, were also frivolous in the context of a *Bivens* action, since it could not reasonably be said, in light of the law at the time of the FAA's actions against the plaintiffs, that the defendant officials would have known that their adherence to FAA procedures was clearly unconstitutional. *Id.* at a17.

The court of appeals also upheld the district court's imposition of sanctions against petitioner for bringing the FTCA action. The court of appeals agreed with the district court that "reasserting * * * arguments in a new com[plaint] in a district court four days after that court has rejected those arguments in the context of the same factual circumstances affords grounds for finding that the new pleading was interposed for an improper purpose." Pet. App. a21. The court also upheld the

district court's conclusion that, in the FTCA action, petitioner failed to distinguish the underlying legal theories from those rejected in the *Bivens* action, which "evi[nced] a lack of good faith argument for the extension, modification, or reversal of existing law." *Ibid.*

Although the court of appeals thus concluded that the district court properly applied the standards for Rule 11 sanctions in place at the time of its decisions, the court also observed that Rule 11 had been amended after the sanctions orders were entered. Whereas, under the old version of the Rule, the district court was required to impose sanctions on petitioner once it determined that his pleadings were frivolous, see Pet. App. a30, the amended version of the Rule makes the decision to impose sanctions discretionary rather than mandatory, *id.* at a23. In addition, the old Rule required that arguments for extensions, modifications, or reversals of existing law be made in "good faith," but the new Rule requires that such arguments be "nonfrivolous." *Id.* at a24.

In light of those amendments, which are to be applied to cases pending on the effective date of the amendment "insofar as just and practicable," Pet. App. a24, the court of appeals concluded that the sanctions decisions should be remanded to the district court, to give that court an opportunity to exercise its discretion under the amended Rule 11. The court of appeals required, however, that the district court "should otherwise adhere to the version of Rule 11 in effect at the time of its prior decisions." *Ibid.* The court reasoned that "[a]ny further retroactive application of the amended Rule 11 would charge [petitioner] with knowledge of a rule not in effect at the time of filing and therefore would not advance

Rule 11's central goal of deterring baseless filings." *Id.* at a24-a25.

4. On remand, the district court, exercising its discretion under the new version of Rule 11, reaffirmed both of its prior decisions to impose sanctions on petitioner. Pet. App. a186-a187, a188-a189.

ARGUMENT

1. The decision of the court of appeals to remand this case with instructions to the district court to apply the amended version of Rule 11 in part constituted a just and practicable application of the amended Rule to the pending case. In reviewing the sanctions imposed on petitioner, the court of appeals acknowledged two changes to Rule 11 that are relevant to this case. First, the amendment of the Rule made the imposition of sanctions discretionary on the part of the district court. Second, the standard imposed on parties who argue for an extension, modification, or reversal of existing law or the establishment of new law is arguably more stringent under the amended Rule. Under the new Rule, such arguments must be "nonfrivolous," whereas, under the old Rule, such arguments were required to be made in "good faith." The advisory committee's note makes clear that the amendment "establishes an objective standard, intended to eliminate any 'empty-head pure-heart' justification for patently frivolous arguments." Fed. R. Civ. P. 11, advisory committee note (1993 Amendment) (28 U.S.C. App. at 775 (Supp. V 1993)).

The court of appeals concluded that petitioner should receive the benefit of the new discretion afforded the district courts, but should not be punished under the new standard regarding arguments for extension or modification of the law. The court reasoned that to charge petitioner with knowledge of a standard of

nonfrivolousness "not in effect at the time of filing * * * would not advance Rule 11's central goal of deterring baseless filings." Pet. App. a24-a25. The court of appeals' decision was thus to petitioner's benefit in all material respects.

2. a. Petitioner contends (Pet. 22-31), however, that the court of appeals should also have remanded the case for application of the new Rule's provision requiring the district courts to describe with specificity the conduct that constitutes a violation of Rule 11. See Fed. R. Civ. P. 11(c)(3) ("When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.").[4] According to petitioner, the court of appeals' instructions limiting the application of amended Rule 11 relieved the district court of the obligation to identify with specificity petitioner's conduct that violated Rule 11 and denied petitioner the opportunity "to show that none of the carefully constructed counts in the complaints was in the least bit frivolous." Pet. 9.[5]

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[4] Petitioner urges the Court to issue a writ of mandamus to the court of appeals to require the application of amended Rule 11 on remand, but there is no basis in the record for such extraordinary relief. The relief sought by petitioner can readily be granted, if appropriate, by writ of certiorari. "[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. * * * Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980). Petitioner acknowledges that his petition may be treated as a petition for a writ of certiorari, and he invokes the Court's jurisdiction under 28 U.S.C. 1254 in the alternative. Accordingly, this opposition treats petitioner's arguments as if they had been made in a petition for a writ of certiorari.

[5] Petitioner also argues that the equities involving his financial condition were not considered by the district court in imposing

Contrary to petitioner's suggestion, the court of appeals did not preclude the application of any new favorable specificity standard added by the amended Rule 11. A requirement of specificity was well established as part of the Rule 11 analysis prior to the 1993 amendment, as petitioner acknowledges (Pet. 22, 24). Under the old version of Rule 11, a decision to impose sanctions against an attorney required "specific findings of fact and conclusions of law." *Thomas* v. *Capital Security Servs.*, 812 F.2d 984, 990 (5th Cir. 1987); accord *White* v. *General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990) ("[T]he sanctioning of a party requires specific findings that the party was aware of the wrongdoing."), cert. denied, 498 U.S. 1069 (1991); *Thomas* v. *Evans*, 880 F.2d 1235, 1240 (11th Cir. 1989); *Brown* v. *Federation of State Medical Bds.*, 830 F.2d 1429, 1438 (7th Cir. 1987). District courts were required to "state with some specificity the reasons for the imposition of a sanction, and the manner in which the sanction was computed." *Teamsters Local No. 579* v. *B & M Transit, Inc.*, 882 F.2d 274, 279-280 (7th Cir. 1989).

b. In this case, the district court gave sufficiently specific reasons to justify its decision to impose sanctions on petitioner. In the *Bivens* action, the district court found that petitioner had advanced the same arguments that he had offered before to four courts of appeals without success, that his arguments therefore had no basis in existing law, and that petitioner also had presented no good-faith argument for the reversal of that

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sanctions. Pet. 10-11. Petitioner, however, had the opportunity to make such equitable arguments to the district court, but he failed to respond to the district court's invitation for submissions regarding the appropriate sanction to be imposed. See Pet. App. a37-a40, a51, a53.

existing law. Pet. App. a32-a34. In the FTCA case, the district court found that petitioner's repeated presentation of rejected legal arguments revealed that the motivation for the lawsuit was a personal agenda against the FAA, which was an improper purpose for filing the complaint. *Id.* at a47-a50. The district court also reaffirmed its prior conclusion that petitioner had no good-faith basis for advocating the reversal of existing law precluding his legal arguments about the invalidity of the FAA's actions. *Id.* at a46.

Petitioner contends that the district court should have scrutinized each count of each complaint for reasonableness before imposing sanctions. Nothing in Rule 11, however, requires that degree of specificity. Even the amended Rule requires only that the district court describe "the conduct determined to constitute a violation of [the Rule]" (Fed. R. Civ. P. 11(c)(3)); it does not require the district court to parse pleadings to determine whether any nonsanctionable arguments are contained therein. Under the Rule, an attorney may be sanctioned for advancing a frivolous claim, even if he also advances other, nonfrivolous ones. *Teamsters Local No. 579*, 882 F.2d at 280-281. Here, the district court imposed sanctions on petitioner because the majority of the claims he advanced were frivolous; even if petitioner also advanced nonfrivolous ones in other pleadings or parts of pleadings, that does not excuse his conduct in violation of Rule 11. Moreover, when the district court invited submissions on the amount of sanctions to be imposed, petitioner had an opportunity to argue that the sanction should be apportioned to reflect only the defendants' expenses in meeting the nonfrivolous claims, but petitioner did not take advantage of that opportunity. See note 5, *supra*. Consequently, there is no reason to remand this case for a recalculation of the sanctions.

CONCLUSION

The petition for a writ of mandamus should be denied. If the petition for a writ of mandamus is treated as a petition for a writ of certiorari, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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